



# Review of National Implementing Legislation

The Departments of Commerce, State, and Justice and the staff of the United States Securities and Exchange Commission (SEC) have reviewed the implementing legislation of the following twenty countries: Australia, Austria, Belgium, Bulgaria, Canada, the Czech Republic, Finland, Germany, Greece, Hungary, Japan, Korea, Mexico, Iceland, Norway, the Slovak Republic, Spain, Sweden, Switzerland, and the United Kingdom. Legislative reviews of eleven of these countries appeared in last year's report; they have been revised and updated as necessary. In addition to these reviews, this chapter also provides a summary of the 1998 amendments made to the Foreign Corrupt Practices Act (FCPA) to implement the OECD Convention.

The views contained in this chapter are those of the U.S. government agencies and staff mentioned above and not necessarily those of the Working Group on Bribery, the body at the Organization for Economic Cooperation and Development that is reviewing the implementing legislation of the signatories to the Convention in the OECD monitoring process. Information for the reviews in this chapter was obtained from implementing legislation and related laws of the countries listed above, reporting from U.S. embassies, private sector comments, publications, nongovernmental organizations, and other public sources. The Working Group's assessment of implementing legislation is expected to be made public

later this summer and will be linked to the Department of Commerce's website when available.

Our methodology for analyzing implementing legislation was to compare it with the requirements of the Convention. We looked first at whether the legislation contains provisions implementing the basic statement of the offense, set forth in Article 1 of the Convention, which obligates the country to criminalize the bribery of foreign public officials. We also looked closely at the definitions of the offeror and offeree of the bribe, to ensure that transactions within the scope of the Convention are adequately covered, pursuant to Article 1 of the Convention. Article 1 requires each party to criminalize the bribery of foreign public officials by "any person." Article 1.4 defines "foreign public official" as: any person holding a legislative, administrative, or judicial office, whether they are appointed or elected; any person exercising a public function; and any official or agent of a public international organization. We then examined the manner and extent to which the country will exercise its jurisdiction in enforcing its law, in accordance with Article 4 of the Convention.

We have paid special attention to the penalties imposed for the offense of bribery of foreign public officials, which Article 3 of the Convention states must be "effective, proportionate, and dissuasive." Where possible, we have examined other issues, such as bribery as

a predicate offense to money laundering (Article 7), provisions on books and records (Article 8), mutual legal assistance and extradition (Articles 9 and 10), and conspiracy, attempt, and authorization (Article 1.2).

Drawing from this methodology, each country review follows the same format:

- Basic statement of the offense.
- Jurisdictional principles.
- Coverage of payor/offendor.
- Coverage of payee/offeree.
- Penalties.
- Books and records provisions.
- Money laundering.
- Extradition/mutual legal assistance.
- Complicity (including incitement, aiding and abetting, or authorization), attempt, conspiracy.

Analyzing a party's implementing legislation is a complex undertaking that requires an understanding of not only the party's new laws implementing the Convention but also the existing body of legislation relevant to bribery and corruption. Convention implementation differs markedly among the parties depending on their individual legal systems. Some parties enacted separate new legislation, whereas others amended existing domestic antibribery provisions of their laws. We have taken into consideration throughout the review process that the Convention seeks to assure functional equivalence among the measures taken to sanction bribery, without requiring absolute uniformity or changes in fundamental principles of a party's legal system.

We are continuing to review information on relevant legislation and to monitor the signatories' implementation of the Convention, independently, as well as within the OECD Working Group on Bribery. Further analysis of implementing legislation and related laws is required for us to have a thorough understanding of how each country is attempting to fulfill its obligations to meet the Convention's standards for criminalizing the bribery of foreign public officials. Completing this analysis remains a high priority of the U.S. government agencies responsible for monitoring implementation of the Convention.

## Concerns About Implementing Legislation

Based on information currently available, we are generally encouraged by the efforts of other parties to implement the Convention. However, for a number of countries, we have concerns about how requirements have been addressed and, in some cases, the absence of specific legislative provisions to fulfill obligations under the Convention. Several countries, including Japan and the

United Kingdom, have implementing or pre-existing legislation that we believe falls short of the Convention's requirements. We have called upon these two countries in particular, since they are key exporters and influential OECD members, to act expeditiously to bring their implementing legislation into conformity with the Convention. The following concerns are especially noteworthy and will require further examination as we progress to the enforcement stage of the monitoring process of the Convention:

• *Deficiencies in Japan's Implementation:* Japan's implementing legislation raises several issues. For example, the Japanese legislation contains a "main office" exception, which provides that the legislation will not apply where the person who pays a bribe to a foreign public official is employed by a company whose "main office" is in the corrupt foreign official's country. Thus, a Japanese national employed by a foreign company may not be prosecuted for the bribery of an official of that company's home country even if the bribe is offered or paid in Japan. We believe that this exception is a substantial loophole in the Japanese implementing legislation. Also, we believe that given the large size of Japanese companies and the high value of many international transactions, a maximum fine equivalent to approximately \$2.8 million does not provide "effective, proportionate, and dissuasive" penalties for legal persons. In addition, there are serious questions concerning Japan's ability to confiscate the proceeds of bribery.

• *Deficiencies in the U.K.'s Implementation:* For the United Kingdom, existing corruption laws do not explicitly address bribery of foreign public officials and their adequacy for implementing the requirements of the Convention is not, even in the views of British legal commentators, certain. The U.K. is expected to enact new anticorruption legislation, but passage of the new legislation appears unlikely before the May 2001 elections.

• *Nationality Jurisdiction:* Canada, the U.K., and Japan have declined to extend nationality jurisdiction to offenses committed under their laws implementing the Convention, although their legal systems do provide for nationality jurisdiction over other offenses. Further, some countries, including, Austria, Belgium, and Finland, while asserting nationality jurisdiction, make it contingent upon the principles of dual criminality or reciprocity, thus requiring that the laws of the country whose official is bribed or a third country where the bribe is paid also prohibit bribery of foreign officials. These requirements will significantly limit the ability of these parties to prosecute bribery of foreign officials.

• *Liability of Legal Persons:* Many countries, including Austria, Bulgaria, the Czech Republic, Hungary, the Slovak Republic, Switzerland, and Spain, have not provided for effective, proportionate, and dissuasive criminal or noncriminal sanctions for legal persons. Austria, Bulgaria, the Czech Republic, Hungary, the Slovak Republic, and Switzerland have indicated that they are in the process of amending their legislation in this respect.

• *Differing Standards for Bribery of EU Officials:* A number of European Union member countries implemented the Convention in conjunction with various EU anticorruption instruments. The implementing legislation of some of these countries contains several definitions of the term foreign public official, or different jurisdictional requirements, depending on whether or not the foreign official is an official of an EU country or an EU institution or another foreign public official. We have concerns that this may lead to different penalties or uneven application of a country's jurisdiction over bribes to EU officials vis-a-vis bribes to other foreign public officials.

• *Limited Statutes of Limitations:* Several countries, such as Japan, Norway, Iceland, and Hungary, have statutes of limitations periods that are three years or less. We are concerned that such short statutes of limitations may not fulfill the Convention requirement that statutes of limitations be sufficiently long so as to provide an adequate period of time for investigation and prosecution.

• *Definition of Foreign Public Official:* In some countries, such as Mexico, the implementing legislation provides for a definition of foreign public official based on "applicable law." This is a concern as it could mean that the definition would depend on the law of the foreign country where the offense occurred, instead of the autonomous definition in the Convention.

• *Inappropriate Defenses:* Several Eastern European countries, such as the Czech Republic, the Slovak Republic, and Bulgaria, have included a defense in their implementing legislation that exempts an individual from prosecution or the imposition of sanctions if the bribe is solicited, the individual pays or agrees to pay the bribe, and thereafter the individual voluntarily and immediately reports the bribe or promise to pay a bribe to the authorities. Although there may be a rationale for permitting such a defense for domestic acts of bribery, the U.S. believes this defense is inappropriate for instances of transnational bribery and may constitute a loophole.

As we continue our analysis of implementing legislation and more information becomes available in the enforcement stage, we will be in a better position to assess the overall conformity of parties' laws with the Con-

vention. The analysis will be useful for our participation in the Working Group on Bribery and our dialogue with signatories on promoting effective implementation of the Convention.

## Summary of Amendments to the FCPA

Through the FCPA, the United States declared its policy that American companies and companies traded on U.S. stock exchanges should act ethically in bidding for foreign contracts and should act in accordance with the U.S. policy of encouraging the development of democratic institutions and honest, transparent business practices. Since 1977, the FCPA has required issuers and U.S. nationals and companies to refrain from offering, promising, authorizing, or making an unlawful payment to public officials, political parties, party officials, or candidates for political office, directly or through others, for the purpose of causing that person to make a decision or take an action, or refrain from taking an action, or to use his influence, for the purpose of obtaining or retaining business.

The International Anti-Bribery and Fair Competition Act of 1998 (IAFCA) amended the FCPA to implement the OECD Convention. First, the FCPA formerly criminalized payments made to influence any decision of a foreign public official or to induce him to do or omit to do any act in order to obtain or to retain business. The IAFCA amended the FCPA to include payments made to secure "any improper advantage," the language used in Article 1.1 of the OECD Convention.

Second, the Convention calls on parties to cover "any person." The FCPA prior to the passage of the IAFCA covered only issuers with securities registered under the 1934 Securities Exchange Act and "domestic concerns." The IAFCA expanded the FCPA's coverage to include all foreign persons who commit an act in furtherance of the offer, promise to pay, payment, or authorization of the offer, promise, or payment of a foreign bribe while in the United States.

Third, the Convention includes officials of public international organizations within the definition of "public official." Accordingly, the IAFCA similarly expanded the FCPA's definition of public officials to include officials of such organizations. Public international organizations are defined by reference to those organizations designated by executive order pursuant to the International Organizations Immunities Act (22 U.S.C. §288), or otherwise so designated by the President by executive order for the purpose of the FCPA.

Fourth, the Convention calls on parties to assert nationality jurisdiction when consistent with national legal

and constitutional principles. Accordingly, the IAFCA amended the FCPA to provide for jurisdiction over the acts of U.S. businesses and nationals in furtherance of unlawful payments that take place wholly outside the U.S.

Fifth and finally, the IAFCA amended the FCPA to eliminate the current disparity in penalties applicable to U.S. nationals and foreign nationals employed by or acting as agents of U.S. companies. Prior to passage of the IAFCA, foreign nationals employed by or acting as agents of U.S. companies were subject only to civil penalties. The IAFCA eliminated this restriction and subjected all employees or agents of U.S. businesses to both civil and criminal penalties.

One issue that has arisen with respect to U.S. implementation of the Convention is the existing disparity between the maximum term of imprisonment under the FCPA (five years) and that under the domestic corruption statute (fifteen years). (*See* 18 U.S.C. §201.) Article 3.1 of the Convention requires that each party provide for a range of penalties for foreign bribery comparable to those provided for bribery of its own officials. This is an issue that may be addressed in future legislative proposals to Congress.

The following summary of foreign legislation should not be relied on as a substitute for a direct review of the legislation by persons contemplating business activities relevant to these provisions.

## Australia

Australia signed the Convention on December 7, 1998, and deposited its instrument of ratification with the OECD Secretariat on October 18, 1999. Australia has implemented the Convention through the Criminal Code Amendment (Bribery of Foreign Public Officials) of 1999 to the Criminal Code Act of 1995. The amendment was enacted on June 17, 1999, and entered into force on December 18, 1999. The following analysis is based on the amendment, related laws, and reporting from the U.S. embassy in Canberra.

### Basic Statement of the Offense

Section 70.2(1) of the Criminal Code, “Bribery of a Foreign Public Official,” provides that a person is guilty of an offense if

- (a) the person: (i) provides a benefit to another person; or (ii) causes a benefit to be provided to another person; or (iii) offers to provide, or promises to provide, a benefit to another person; or (iv) causes an offer of the provision of a benefit, or a promise of the provision of a benefit, to be made to another person; and

- (b) the benefit is not legitimately due to the other person; and

- (c) the first-mentioned person does so with the intention of influencing a foreign public official (who may be the other person) in the exercise of the official’s duties as a foreign public official in order to: (i) obtain or retain business; or (ii) obtain or retain a business advantage that is not legitimately due to the recipient, or intended recipient, of the business advantage (who may be the first-mentioned person).

Under Section 70.2(2), in determining whether a benefit or a business advantage is “not legitimately due,” the following are to be disregarded:

- (a) the fact that the benefit/business advantage may be customary, or perceived to be customary, in the situation;
- (b) the value of the benefit/business advantage;
- (c) any official tolerance of the benefit/business advantage.

The amendments contain exceptions for payments that are lawful in the foreign public official’s country (Section 70.3) and for facilitation payments made “for the sole or dominant purpose of expediting or securing the performance of a routine government action of a minor nature.” (Section 70.4).

### Jurisdictional Principles

Under Section 70.5(1), there is jurisdiction over a person who commits bribery of a foreign public official wholly or partly in Australian territory, or wholly or partly on board an Australian aircraft or ship. Nationality jurisdiction is established under Section 70.5(1)(b), which covers acts of bribery of foreign public officials conducted wholly outside Australia by an Australian national, an Australian resident (subject to the Attorney General’s consent), or “body corporate” incorporated under Australian law.

We understand that there is no applicable statute of limitations for prosecutions of bribery of a foreign public official.

### Coverage of Payor/Offendor

Section 70.2(1) of the Criminal Code applies to “a person.” Under Australian law, “person” refers to natural persons as well as “bodies corporate.” We understand that the latter refers to legal persons generally. Under Section 12.3(2) of the Criminal Code, bodies corporate may be held criminally liable where a board of directors carries out or authorizes the conduct; where a “high managerial agent” does so; or where a “corporate culture” exists that permitted or led to the conduct.

## **Coverage of Payee/Offeree**

Under Section 70.1 of the Criminal Code, “foreign public official” is broadly defined to include employees or officials of, or persons who work under contract for or are otherwise in the service of, a foreign government body (or subdivision thereof), including members of legislatures; employees of, or persons who work under contract for or are otherwise in the service of, a public international organization; and authorized intermediaries of such persons. For this purpose, “foreign government body” includes a “foreign public enterprise,” which is defined to include instances in which the government exercises de jure or de facto control over the enterprise, or in which the enterprise enjoys special legal rights, benefits or privileges because of its relationship to the government.

## **Penalties**

The Criminal Code provides that natural persons who are convicted of bribing a foreign public official are subject to a fine of A\$66,000 (approximately \$38,000), imprisonment for a maximum of ten years, or both. Bodies corporate are subject to a fine of A\$330,000 (approximately \$188,000). These exceed the penalties in the Criminal Code for bribery of domestic public officials.

Under Section 19 of the Proceeds of Crime Act 1987, courts may order the forfeiture of “tainted property,” defined as “property used in, or in connection with, the commission of the offense,” or “proceeds of the offense.”

## **Books and Records Provisions**

Companies are required, under Section 298 of the Corporations Law, to keep financial records that “(a) correctly record and explain their transactions and financial position and performance; and (b) would enable true and fair financial statements to be prepared and audited.” Violations of Section 298 are punishable by a criminal fine of up to A\$12,500 (approximately \$7,100). Under Section 296 of the Corporations Law, annual financial reports (required of most companies) must be consistent with the Australian accounting standards. Failure to comply with those standards can result in civil penalties for company directors. Section 310 of the Corporations Law requires that companies furnish external audit reports to the Australian Securities and Investment Commission.

## **Money Laundering**

Bribery of foreign, as well as domestic, public officials is a predicate offense for the application of the money laundering provisions in the Proceeds of Crime Act 1987. Section 81(3) of that act pertains to actions or transactions involving the proceeds of crime, where the

person knows or reasonably should know that the money or other property is derived from some form of unlawful activity.

## **Extradition/Mutual Legal Assistance**

The 1976 U.S.–Australia extradition treaty, as amended in 1990, provides for extradition for offenses that are punishable under the laws of both parties by deprivation of liberty for a maximum period of more than one year. Under the authority of the Extradition Act of 1988, Australia may extradite persons on the basis of bilateral extradition treaties, multilateral treaties with extradition provisions, or bilateral arrangements or understandings based on reciprocity. Accordingly, we understand that Australia is currently able to extradite persons to all of the signatories of the Convention except Bulgaria. Australia generally does not refuse extradition on the grounds that an individual is an Australian national.

A bilateral mutual legal assistance treaty between the United States and Australia entered into force in 1999. Legal assistance can also be provided, in the absence of a treaty, on the basis of reciprocity under the Mutual Assistance in Criminal Matters Act 1987.

## **Complicity, Attempt, Conspiracy**

Section 11.1(1) of the Criminal Code pertains to aiding, abetting, counseling, and procuring the commission of a bribery of a foreign public official, as well as an attempt to commit that offense. Conspiracy to bribe a foreign public official is covered under Section 11.5(1) of the Criminal Code.

## **Austria**

Austria signed the Convention on December 17, 1997. The Austrian Parliament passed legislation amending the Austrian Penal Code in order to implement and ratify the Convention on July 17, 1998. The domestic legislation implementing the Convention became effective on October 1, 1998. Austria deposited its instrument of ratification with the OECD on May 20, 1999. The Austrian legislation entered into force on July 23, 1999. This analysis is based on those amendments as well as information provided by the U.S. embassy in Vienna.

The Austrian legislation raises a number of concerns. At present, it contains no criminal responsibility for legal persons, nor does it provide for sufficient comparable administrative or civil sanctions. The punishment for natural persons is limited to imprisonment of only two years, and there is no provision of fines for natural persons. We also are concerned that Austria may assert nationality jurisdic-

tion only under the condition of dual criminality, i.e., when the offense is also punishable in the country where it was committed, particularly in the case where an Austrian national bribes a foreign public official in a third country.

### **Basic Statement of the Offense**

The basic statement of the offense is contained in Austrian Penal Code Section 307(1), which provides that Whoever offers, promises, or grants a benefit for the principal or a third person ... to a foreign official for the commission or omission of an official act or a legal transaction in violation of his duties in order to gain or retain an order or other unfair advantage in international trade, shall be punished by imprisonment of up to two years.

### **Jurisdictional Principles**

Austria exercises both territorial and nationality jurisdiction. Under Sections 62, 63, and 67 of the Austrian Penal Code, Austria may exercise jurisdiction over all offenses committed in Austria or on an Austrian aircraft or vessel, irrespective of location. The territoriality principle is broadly interpreted ( e.g., even a phone call from Austria in furtherance of the bribe transaction would suffice). However, in order for nationality jurisdiction to apply, Section 65 of the Austrian Penal Code provides that the offense must also be punishable in the country where it has been committed. Austria will exert jurisdiction over non-nationals where the offender was arrested in Austria and cannot be extradited (again, the offense must be punishable in the country where it has been committed).

### **Coverage of Payor/Offendor**

Section 307 of the Austrian Penal Code, cited above, covers bribes made by “whoever.” This encompasses only natural persons. We understand that Austria plans on implementing the Second Protocol to the EU Convention on the Protection of the Financial Interests of the European Community by mid-2002 and that it will then hold legal persons responsible for active bribery of foreign public officials.

### **Coverage of Payee/Offeree**

Foreign public officials are defined in Section 74 (4c) of the Austrian Penal Code as:

any person who holds an office in the legislature, administration, or judiciary of another state, who is fulfilling a public mission for another state or authority or a public entity of another state,

or who is an official or representative of an international organization.

### **Penalties**

Section 307 of the Austrian Penal Code provides a maximum term of imprisonment of two years for the payor/offendor, the same penalty imposed for the bribery of domestic officials. As stated above, legal persons are not covered in the amendments to the Penal Code. However, Austrian Penal Code Section 20 does provide for confiscation of illegal gains, and there are also some applicable administrative penalties applicable to legal persons.

Austria will confiscate criminal proceeds pursuant to Penal Code Section 20, paragraph 4, although there are several exceptions under Section 20a paragraphs 1 and 2, i.e., where the enriched person has satisfied or has contractually bound itself to satisfy civil law claims in connection with the offense, or has been sentenced, or if the gains are removed by other legal measures. Also, confiscation is apparently not permitted if the gains are less than 300,000 Austrian shillings (approximately \$19,752), the gains are disproportionate to the cost of the proceedings, or it would constitute “inappropriate hardship.”

Austria provides for administrative liability for legal persons. Under Section 58, paragraph 1 of the Federal Law on Public Procurement, a legal person may be excluded from public procurement where there is a likelihood that its employee has seriously misbehaved in the conduct of business, even absent the initiation of criminal proceedings or a conviction. Section 123 of the Federal Law on Public Procurement apparently also allows the contracts already awarded to be rescinded where it was obtained through an illegal act of a representative of a legal person. Under Section 13 of the Austrian Business Law of 1994, legal persons whose business conduct was significantly influenced by the conduct of the convicted natural person may be excluded from the exercise of business if the natural person has been sentenced for the offense of bribery to a prison term of more than three months or a fine.

Section 57 of the Austrian Penal Code provides that bribery prosecutions cannot be brought if not initiated within five years after the commission of the offense.

### **Books and Records Provisions**

Section 189, paragraph 1 of the Austrian Code of Commercial Law requires merchants to keep books and records in accordance with correct accounting principles. Section 190, paragraph 2 provides that all entries “must be complete, accurate, up-to-date, and or-

derly.” Section 268 provides that annual financial statements and company reports must be examined by an auditor. The general accounting provisions apply to all persons engaged in commercial activities, excluding small merchants. Also, certain small corporations are exempt from the obligatory annual audit. Under Section 122 of the Federal Law of Private Companies, the penalty for violation of the accounting provisions is imprisonment for up to two years or a fine. This applies to managing directors, members of the supervisory board, and agents. The same penalties apply under the Federal Law on Public Companies.

### **Money Laundering**

Section 165 of the Austrian Penal Code establishes all punishable offenses as predicate offenses for money laundering. Persons may be prosecuted for having money laundered property deriving from the predicate crime of bribery even if it was committed abroad. The penalty for money laundering is imprisonment for up to two years or a fine.

### **Extradition/Mutual Legal Assistance**

Under Section 11, paragraph 1 of the Extradition and Mutual Legal Assistance Act, extradition is permitted if the offense is punished under both the law of the requesting country and Austrian law with imprisonment of more than one year. It is our understanding that the requirement of dual criminality will be met in cases arising between Convention parties. Section 12, paragraph 1 of the Extradition and Mutual Legal Assistance Act prohibits the extradition of Austrian nationals. However, it is our understanding that where Austria will not extradite its own nationals, it will exercise jurisdiction over them in conformity with Convention Article 10.3.

Austria has entered into bilateral extradition agreements with three signatories to the Convention: Australia, Canada, and the United States. Austria has also signed the European Extradition Agreement which governs extradition requests amongst Belgium, Bulgaria, the Czech Republic, Denmark, Germany, Finland, France, Greece, Hungary, Ireland, Iceland, Italy, Luxembourg, Netherlands, Norway, Poland, Portugal, Sweden, Switzerland, the Slovak Republic, Spain, Turkey, and the United Kingdom. With regard to Belgium, Germany, France, Greece, Italy, Luxembourg, the Netherlands, Portugal, and Spain, the Schengen implementation agreement of 1997 also applies.

Austria has mutual legal assistance treaties with Australia, Estonia, Latvia, Monaco, Slovenia, the former Yugoslavia, and the United States.

It is our understanding that requests originating from countries not mentioned above will be handled in accordance with Austrian Federal Law on Extradition and Judicial Assistance, and on the basis of reciprocity. Consultations are also covered by the same law. The bribery of a foreign public official is an extraditable offense under the extradition treaties to which Austria is a party. It is our understanding that the condition of reciprocity will met with regard to the Convention, unless the requesting state refuses reciprocity. Similarly, dual criminality is required for the granting of mutual legal assistance, but it is our understanding that between Austria and parties to the Convention, the condition will always be met under Article 1.

We understand that Austrian authorities will not decline to render mutual legal assistance for criminal matters within the scope of the Convention on bank secrecy grounds.

### **Complicity, Attempt, Conspiracy**

Austrian Penal Code Section 12 provides that anyone who is an accessory or who instigates a criminal act is punished as a perpetrator. Section 15 covers attempt. Conspiracy is not punishable under Austrian law.

## **Belgium**

Belgium signed the Convention on December 17, 1997, and deposited its instrument of ratification on July 27, 1999. In order to implement the Convention, Belgium enacted two laws. One is the Bribery Prevention Act (known as Act 99/808), which entered into force on April 3, 1999, and which amended provisions of the Criminal Code relating to the bribery of public officials. The other is the Act of May 4, 1999 (known as Act 99/1890), which entered into force on August 3, 1999, and which creates criminal liability for legal persons. The following analysis is based on those acts, related Belgian laws, and reporting from the U.S. embassy in Brussels.

One concern is that the definitions of “foreign public official” under Belgian law are not autonomous. In addition, there are certain limitations on the exercise of nationality jurisdiction.

### **Basic Statement of the Offense**

Article 246, Section 2 of the Criminal Code provides that “the act of proposing, whether directly or through intermediaries, an offer, promise or advantage of any kind to a person exercising a public function, either for himself or a third party, in order to induce him to act in one of the ways specified in Article 247 shall constitute active bribery.” Article 247 specifies four different types

of acts: (1) an act within the scope of a person's responsibilities that is proper but not subject to remuneration; (2) performance of an improper act, or refraining from a proper one, in the exercise of one's function; (3) commission of an offense in the exercise of one's function; or (4) use of influence derived from one's function to obtain performance of an act, or failure to perform one, by a public authority. Pursuant to Article 250, Articles 246 and 247 now apply to persons who exercise a public function in a foreign state, as well as in Belgium. Article 251 extends the coverage of Articles 246 and 247 to persons who exercise a public function in an organization governed by public international law. These provisions are not limited to bribes made in order to obtain or retain business or other improper advantage in international business.

### **Jurisdictional Principles**

Under Article 3 of the Criminal Code, jurisdiction is established over offenses committed within Belgian territory by Belgian or foreign nationals. Act 99/808 added Article 10 *quater* to the Code of Criminal Procedure. This provides for jurisdiction in certain cases over persons (foreign as well as Belgian nationals) who commit bribery offenses outside the territory of Belgium. Various limitations apply, however. For example, if the bribe recipient exercises a public function in a European Union member state, Belgian prosecution may not proceed without the formal consent of the other state. If the bribe recipient exercises a public function in a state outside the EU, the formal consent of that state is again required in order to prosecute. In addition, there is a requirement that the act be a violation of the laws of the other state, and that the state would punish such bribery of a person exercising a public function in Belgium. Bribery involving a person who exercises a public function within an EU institution is subject to prosecution. For bribes involving persons exercising a public function within other public international organizations, the formal consent of the organization is required before prosecution can proceed.

Under Articles 21-18 of the Code of Criminal Investigation, the statute of limitations for criminal offenses is ten years from the date the offense was committed. This period may be extended because of the conduct of investigations or prosecutions.

### **Coverage of Payor/Offerrer**

Under the Article 5 of the Criminal Code as amended by Act 99/1890, all persons, natural or legal, are subject to prosecution for the bribery of a foreign public official.

### **Coverage of Payee/Offeree**

Under Article 250, Section 2, whether a person exercises a public function in another state is determined in accordance with the law of that state. When the foreign state is not a member of the European Union, it is necessary also to determine whether the function is considered a public one under Belgian law. Under Article 251, Section 1, whether a person exercises a public function in a public international organization is evaluated by reference to the by-laws of that organization. Thus, these definitions are not autonomous.

Article 246, Section 3 provides that corruption offenses also apply in the case of a person who is a candidate for the exercise of a public function, who implies that he will exercise such a function, or who misleads another into believing that he currently exercises such a function.

### **Penalties**

We understand that the applicable penalties are derived not only from Articles 247–249, but also from other provisions of the Criminal Code. Individuals who commit bribery of a foreign public official are subject to fines ranging from BF20,000 to BF40 million (approximately \$444–\$888,000), and/or imprisonment for a period of six months to fifteen years. Legal persons face fines ranging from BF600,000 to BF72 million (approximately \$13,000–\$1.6 million). Penalties are more severe if the person to whom the bribe is offered or paid exercises certain functions relating to the investigation, prosecution, or adjudication of offenses, e.g., police officers, prosecutors, jurors, or judges. The existence of a bribery agreement between the payor/offerrer and the payee/offeree is also an aggravating circumstance.

Belgian law also provides for certain civil and administrative penalties for the bribery of a foreign public official:

- Loss of rights such as holding public office (Articles 31–33 of the Criminal Code).

- Disqualification from public procurement (Article 19, Section 1 of the Act of March 20, 1991).

- Prohibition from exercising certain professional functions (Section 1 of Royal Order No. 22 of October 24, 1934).

Articles 35–39 and 89 of the Code of Criminal Investigation permit seizure of bribes and the proceeds of bribery. Articles 42-43 of the Criminal Code authorize the confiscation of

- items that are the object of the offense or that were used or intended to be used to commit the offense (when they belong to the convicted person), any proceeds of the offense and patrimo-



nial advantages derived directly from the offense, as well as any goods and assets acquired in exchange for these advantages and any income derived from investing them.

### **Books and Records Provisions**

The Act of July 17, 1995, and the Companies Act of 1872 impose accounting requirements on all commercial concerns and prohibit the establishment of off-the-books accounts, use of false documents, and other acts covered under Article 8 of the Convention. Those who violate these provisions are subject to criminal, civil, and administrative penalties.

### **Money Laundering**

Under the Act of January 11, 1993, there is a prohibition on the laundering of “the proceeds of an offense involving bribery of public officials,” domestic or foreign.

### **Extradition/Mutual Legal Assistance**

The U.S.-Belgium extradition treaty, which entered into force in 1997, provides that offenses shall be extraditable if punishable under the laws of both parties by deprivation of liberty for a period of more than one year. Bribery of a foreign public official is also an extraditable offense under the Extradition Act of March 15, 1874. Belgium has bilateral extradition treaties with twenty countries and is a party to the European Convention on Extradition of December 13, 1957. Section 1 of the Extradition Act of March 15, 1874, prohibits the extradition of Belgian nationals.

The U.S.-Belgium mutual legal assistance treaty entered into force on January 1, 2000. Belgium may also provide legal assistance under the authority of other bilateral or multilateral mutual legal assistance treaties; the Convention applying the Schengen Agreement of June 19, 1990; the European Convention on Mutual Assistance in Criminal Matters of April 20, 1959; or provisions of the domestic Judicial Code.

### **Complicity, Attempt, Conspiracy**

Complicity—including aiding and abetting, authorization, and incitement—is covered under Articles 66–67 of the Criminal Code. Attempting to bribe a public official, domestic or foreign, is generally not specifically covered under Belgian law, although the mere offer of a bribe is sanctionable.

## **Bulgaria**

Bulgaria signed the Convention on December 17,

1997, and deposited its instrument of ratification with the OECD Secretariat on December 22, 1998. A Law on Amendment to the Penal Code was passed by Parliament on January 15, 1999, and came into force on January 29, 1999.

Bulgaria’s implementing legislation amends Articles 93 and 304 of the Penal Code to cover bribery of foreign public officials in the course of international business activities. The following analysis is based upon the Penal Code and reporting from the U.S. embassy in Sofia and nongovernmental organizations.

Bulgarian law currently does not provide for liability—criminal or otherwise—of legal persons, although the Bulgarian Parliament is considering legislation providing for noncriminal sanctions for legal persons who bribe foreign public officials. There are also concerns over available defenses.

### **Basic Statement of the Offense**

Article 304(1) of the Penal Code provides for criminal penalties for “[a] person who gives a gift or any other material benefit to an official in order to perform or not to perform an act within the framework of his service, or because he has performed or has not performed such an act.” Under Article 304(2), this applies to a person who “gives a bribe to a foreign official in relation to the performance of international business activity.” Current Bulgarian law does not cover the promising or offering of a bribe, but this is included in legislation that is pending before Parliament. The U.S. embassy in Sofia advises that Bulgarian law was recently amended to cover the promising or offering of a bribe.

Under Articles 306 and 307, there are available defenses for (1) a person who has been blackmailed into giving a bribe or (2) a person who has of his own accord informed the authorities of the bribe. We understand that recent legislation has eliminated provocation as a defense.

Although Article 304 does not address bribes made through intermediaries, Article 305a imposes criminal liability on persons who “mediate” in the giving or receiving of a bribe.

### **Jurisdictional Principles**

Article 3 of the Penal Code states that the code applies to all crimes committed in the territory of Bulgaria. It is not clear how this provision applies to crimes committed only in part in Bulgaria. Under Article 4(1) of the Penal Code, the code applies to crimes committed by Bulgarian citizens abroad.

Under Article 80 of the Penal Code, the statute of limi-

tations for offenses carrying a penalty of imprisonment for three years or less is two years, while for offenses carrying a penalty of imprisonment of more than three years the statute of limitations is generally five years.

### **Coverage of Payor/Offeror**

Article 304 refers to acts by “a person,” without reference to nationality.

### **Coverage of Payee/Offeree**

In amended Article 93 of the Penal Code, “foreign official” is defined as any person:

- exercising duties in a foreign country’s public institutions (office or agency);
- exercising functions assigned by a foreign country, including for a foreign public enterprise or organization; or
- exercising duties or tasks of an international organization.

### **Penalties**

Under Article 304 of the Penal Code, the penalty for bribery of a domestic or foreign public official is imprisonment for a term of up to three years, unless the official has violated his official duties in connection with the bribe, in which case the penalty is imprisonment for a term of up to five years. “Mediation” of bribery under Article 305a is generally subject to a penalty of imprisonment for up to three years. According to official government sources, legislation recently enacted increases the penalties for all types of corruption.

Legal persons are not subject to criminal liability under Bulgarian law. Currently, there are also no applicable noncriminal sanctions for legal persons who bribe a foreign public official. The Council of Ministers is preparing amendments to the Administrative Offenses and Sanctions Act to introduce noncriminal (monetary) liability of legal persons for such bribery.

Under Article 307a of the Penal Code, “the object of the crime under Articles 301–307 shall be seized in favor of the state and where it is missing, a sum equal to its value is adjudged.” Under Article 53, “objects” subject to seizure include those used in the perpetration of the crime as well as those acquired through the crime.

### **Books and Records Provisions**

Article 5 of the Accountancy Act sets forth certain principles that must be observed in the preparation of records by “enterprises,” which are defined as “any economically separate legal entities, sole proprietorships and companies without legal personality performing any ac-

tivity permitted by the law.” Under Article 308 of the Penal Code, forgery of official documents is punishable by imprisonment for up to three years.

Under Article 15 of the Law on Public Financial Control, the audit of the books and records of certain enterprises is required, and auditors must report infractions to prosecuting authorities. Obligations on accountants are found in Article 57a(1) of the Accountancy Act.

### **Money Laundering**

Under Article 253 of the Penal Code, “[a] person who concludes financial transactions or other transactions with funds or property of which he knows or supposes that they have been acquired by crime” is subject to punishment of imprisonment for one to five years and a fine of 3 million to 5 million old Bulgarian leva (approximately \$1,600–\$2,600). In certain cases, these penalties are increased to imprisonment for one to eight years and a fine of 5 million to 20 million leva (approximately \$2,600–\$10,500).

### **Extradition/Mutual Legal Assistance**

Bribery is not listed as an extraditable offense under the 1924 U.S.-Bulgaria extradition treaty. However, Article 10.1 of the Convention provides that bribery of a foreign public official shall be deemed to be an extraditable offense under extradition treaties between the parties. Dual criminality is required under the treaty and under Article 439 of the Penal Code. Article 25.4 of the Bulgarian Constitution and Article 439b(1) of the Penal Procedure Code prohibit the extradition of Bulgarian nationals.

The United States and Bulgaria do not have a mutual legal assistance treaty. Under Article 461 of the Penal Procedure Code, Bulgaria may provide legal assistance in criminal matters to a requesting state (1) pursuant to the provisions of an international treaty to which Bulgaria is a party, or (2) on the basis of reciprocity.

### **Complicity, Attempt, Conspiracy**

Complicity in criminal acts is covered under Articles 20–22 of the Penal Code. Under Article 21, a person who aids or abets an offense is subject to the same punishment as that which applies to the offense itself, subject to due consideration for the nature and degree of the person’s participation. Articles 17–19 of the Penal Code apply to attempts to commit offenses. Article 18 provides that an attempt is subject to the same punishment as that pertaining to the underlying offense, with due consideration given to the degree of implementation and the reasons why the crime was not completed.

## Canada

The Canadian Corruption of Foreign Public Officials Act, 46–47 Elizabeth II ch. 34, was adopted on December 7, 1998, assented to on December 10, 1998, and entered into force on February 14, 1999.

Sources for this analysis include the text of the act, diplomatic reporting, and information from nongovernmental organizations.

We are concerned that Canada, which has previously asserted nationality jurisdiction over certain other crimes and thus has constitutional authority to do so, has not done so for offenses created to implement the Convention.

### Basic Statement of the Offense

Section 3(1) of the Corruption of Foreign Public Officials Act provides:

Every person commits an offense who, in order to obtain or retain an advantage in the course of business, directly or indirectly gives, offers or agrees to give or offer a loan, reward, advantage or benefit of any kind to a foreign public official or to any person for the benefit of a foreign public official;

(a) as consideration for an act or omission by the official in connection with the performance of the official's duties or functions; or

(b) to induce the official to use his or her position to influence any acts or decisions of the foreign state or public international organization for which the official performs duties or functions.

The act contains exceptions for facilitation payments, payments that are lawful under the written law of the receiving official's country, and payments related to bona fide business promotion and execution of a contract. (*See* Sections 3(3) & (4).)

### Jurisdictional Principles

The Corruption of Foreign Public Officials Act does not contain any specific provisions governing jurisdiction. It is also our understanding that Canadian courts will assert territorial jurisdiction where a significant portion of the activities constituting the nature of the offense takes place in Canada. There must be a real and substantial link between the offense and Canadian territory.

It is our understanding that the courts in Canada have adopted a two-part test for determining whether a crime took place in Canada. The court will first consider all the relevant acts that took place in Canada that may have le-

gitimately given Canada an interest in prosecuting the offense. Second, the court will consider whether it would offend international comity to assert jurisdiction over those acts and the offense. (*See Libman v. R.*, 2 S.C.R. 178 (1985).)

Canada has not asserted extraterritorial jurisdiction for this offense. However, Canadian law provides that any person who, while outside Canada, conspires to commit an indictable offense in Canada shall be deemed to have committed the offense of conspiracy in Canada. (*See* Criminal Code §465(4).) The penalties for conspiracy are the same as those for the substantive offense. (*See* Criminal Code §465(1)(c).)

### Coverage of Payor/Offendor

The Corruption of Foreign Public Officials Act applies to "every person," without reference to nationality. "Person" includes "Her Majesty and public bodies, bodies corporate, societies, companies, and inhabitants of counties, parishes, municipalities or other districts in relation to the acts and things that they are capable of doing and owning respectively." (*See* Criminal Code §2.)

### Coverage of Payee/Offeree

Section 2 of the Corruption of Foreign Public Officials Act defines a "foreign public official" as

(a) a person who holds a legislative, administrative, or judicial position of a foreign state;

(b) a person who performs public duties or functions for a foreign state, including a person employed by a board, commission, corporation or other body or authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function; and

(c) an official or agent of a public international organization that is formed by two or more states or governments, or by two or more such public international organizations.

The act further defines a foreign state to include a foreign national government, its political subdivisions, and their departments, branches, and agencies.

The definition of a public official includes persons employed by "a board, commission, corporation or other body of authority that is established to perform a duty or function on behalf of the foreign state, or is performing such a duty or function." It is our understanding that the legislature intended that judges interpret the terms of the act by reference to the OECD Convention and Official Commentaries, which provide that a "public enterprise" is "any enterprise, regardless of its legal form, over which a government, or governments, may, directly or indirectly,

exercise a dominant influence.” The Act does not address whether state-owned enterprises acting in a commercial context are covered. The Official Commentaries affirmatively state that they are not so covered if the enterprise receives no subsidies or privileges. (See OECD Commentary, footnote 14.)

## **Penalties**

The Corruption of Foreign Public Officials Act provides for a sentence of imprisonment of not more than five years. We understand that corporations are subject to fines at the discretion of the court with no maximum set by statute. There does not appear to be any guidance as to the proper calculation of the fine.

The penalties under the act are roughly congruent to the penalties for domestic bribery except that a person convicted of bribery of a foreign public official is not subject to debarment.

In addition to the penalties for bribery, the act contains two other offenses: possession of the proceeds of bribery (Section 4) and laundering of the proceeds of bribery (Section 5). The penalty for violation of these provisions is up to ten years’ imprisonment, a penalty that is higher than that for the bribery offense itself.

The act incorporates Section 2 of the Criminal Code which defines “person” to include “bodies corporate.” We understand that corporations may be prosecuted criminally in Canada.

The Canadian principle of corporate criminal liability appears to be similar to, but potentially somewhat narrower than, that of the United States. It focuses on an identification of the corporation with the “directing mind,” which is anyone who has been authorized to exercise “the governing executive authority of the corporation.” A corporation is liable if the criminal acts are performed by the manager within the sector of operation assigned to him or her by the corporation. The sector may be functional or geographic or may embrace the entire undertaking of the corporation.

Sections 7 and 9 of the Corruption of Foreign Public Officials Act adds the three offenses created under the act (bribery, possession of proceeds, and money laundering of proceeds) to the statutory list of “enterprise crimes” (see Criminal Code §462.3), thus enabling the government to obtain warrants to search, seize, and detain the proceeds of these offenses and to obtain an order of forfeiture upon conviction. (See Criminal Code §§462.32-.5.)

## **Books and Records Provisions**

Canada has a number of statutes that govern books and records. They prohibit falsification of books and

documents, false pretense, false statement, false prospectus, forgery, and fraud. (See Criminal Code §§361-62, 366, 380, 397, and 400.) However, Canadian business leaders have criticized the Canadian laws as insufficient because they do not prohibit off-the-books accounts, inadequately identified transactions, the recording of non-existent expenses, and the use of false documents.

The generally accepted auditing standards in effect in Canada require the auditor to obtain a written certification from management that it is not aware of any illegal or possibly illegal acts.

## **Money Laundering**

Sections 5 and 7 of the Corruption of Foreign Public Officials Act criminalize the laundering of the proceeds of any payment in violation of the act and makes offenses under the act predicate offenses under Canada’s money laundering legislation. (See Criminal Code 462.3.) The act further criminalizes the laundering of the proceeds of any payment that “if it had occurred in Canada, would have constituted an offense under Section 3.”

## **Extradition/Mutual Legal Assistance**

Canada will provide mutual legal assistance and extradition with respect to the offenses covered by the OECD Convention. Under Canadian law, there must be an extradition agreement with the country requesting extradition; that country must punish the offense by imprisonment for a maximum term of two or more years; and the equivalent offense must also be punishable under Canadian law by a maximum term of imprisonment of two or more years.

## **Complicity, Attempt, Conspiracy**

Canadian law permits prosecution for attempt and aiding and abetting. (See Criminal Code §§21(1), 24.) The Corruption of Foreign Public Officials Act covers any individual who “agrees to give or offer” a payment. (See §3(1).) In addition, as noted, Canadian law provides that a conviction for conspiracy carries the same penalties as a conviction for the substantive offense.

## **Czech Republic**

The Czech Republic signed the Convention on December 17, 1997. The Czech Parliament passed implementing legislation on April 29, 1999, which entered into force on June 9, 1999. The Czech President ratified the Convention under national law on December 20, 1999, and the Czech Republic deposited its instrument of ratification with the OECD on January 21, 2000.

The Czech Republic made only minor modifications to its Criminal Code to implement the Convention, particularly with the addition of a definition for the terms “bribe” and “public official.” Additional legislation to implement amendments to accounting and auditing standards and the procurement law is still under way and is expected to become effective later this year or in 2001. Sources for this analysis include the Czech implementing legislation, relevant Criminal Code provisions, and information from the U.S. embassy in Prague.

Our main concern with the Czech legislation pertains to the defense of “effective repentance,” which provides that the criminal nature of bribery shall not apply if the offender provided or promised a bribe solely because he had been requested to do so and reported the fact voluntarily and without delay to the prosecutor or police authority. We believe this defense is inappropriate for instances of transnational bribery and may constitute a loophole. Also, the Czech law currently does not provide for criminal responsibility for legal persons, or for effective, proportionate, and dissuasive noncriminal sanctions as required by the Convention.

### **Basic Statement of the Offense**

The basic statement of the offense is contained in Section 161, paragraph 2b of the Czech Criminal Code which states that

(1) Whoever in connection with procuring affairs in the public interest provides, offers, or promises a bribe shall be sentenced to imprisonment for up to one year or to a monetary fine;

(2) A perpetrator shall be sentenced to imprisonment of one year to five years or to a monetary fine...(a) if he commits the act referred to in paragraph 1 with the intent of procuring a substantial benefit for him/herself or for another person or to cause substantial harm or other particularly serious effect to another person; (b) if he commits the act referred to in paragraph 1 vis-a-vis a public official.

Section 162a paragraph 1 defines a “bribe” as “an unwarranted advantage consisting in direct material enrichment or other advantage that the person being bribed or another person receives or is to receive with its consent, and for which there is no entitlement.”

The basic statement of the offense under Section 161, paragraph 2b covers “any person,” defined as natural persons. It also covers direct bribes and bribes through intermediaries, and bribes to foreign officials as well as third parties. (Although third parties are not specifically mentioned in the basic statement of the offense (Section

161(2)b), the definition of bribery (Section 162a) which mentions “another person” incorporates the concept of bribes for third parties.) Section 161 also includes the concept of intentionality. The basic statement of the offense also goes beyond the scope of the Convention in that it does not require that the alleged offender acted in the context of international business transactions.

The Czech legislation also contains a defense of “effective repentance” in Section 163, which provides that the criminal nature of bribery and indirect bribery shall not apply if the offender has provided or promised a bribe solely because he has been requested to do so and reported the fact voluntarily and without delay to the prosecutor or police authority.

### **Jurisdictional Principles**

The Czech Republic exercises jurisdiction over any acts committed in whole or in part (or which violated or threatened an interest protected under the Code) in its territory. (Section 17, paragraph 2 of the Criminal Code.) It is our understanding that this would include communication by fax, phone, or acts committed on board a Czech vessel or aircraft. In addition, the Czech Republic will also exert nationality jurisdiction over its nationals and stateless persons who reside permanently in the Czech Republic. (Section 18 of the Criminal Code.) Companies that bribe will be excluded from Czech procurement irrespective of the nationality of their agents, employees, or board members liable for bribery of foreign public officials. Czech law will apply to foreigners and stateless non-Czech residents if the act was committed in a country that also criminalizes the offense, and if the offender is caught in the Czech Republic and was not extradited to a foreign state. (Section 20, Criminal Code.)

### **Coverage of Payor/Offerrer**

The basic statement of the offense only covers bribes by natural persons, as Czech law does not provide for penal responsibility for legal persons.

### **Coverage of Payee/Offeree**

The Czech definition of foreign public official includes the definition of domestic public officials under Section 89 of the Criminal Code in addition to a new definition under Section 162a, paragraph 2, extending the definition of public official (found in Section 161, paragraph 2b) to foreign officials.

Section 89, paragraph 9 of the Criminal Code provides that

A public official shall mean an elected (public) representative or other person authorized by the

state administration or local (municipal) authority, a court or other state organ, or a member of the armed forces or armed corps insofar as he takes part in the fulfilment of the tasks set by society and the state, for which he exercises authority entrusted to him as a part of his responsibility for fulfilment of such tasks. When exercising entitlements and competency according to special legal provisions a public official shall also mean a natural person holding the position of a forest guard, water guard, nature guard, hunting guard or fishing guard. Criminal liability and protection of a public official under individual provisions of this Code shall require that a crime be committed in connection with the official's authority (competency) and responsibility.

Section 162a, paragraph 2 provides that in addition to Section 89, "public official" also includes any person occupying a post (a) in a legislative or judicial authority or the public administration authority of a foreign country, or (b) an enterprise, in which a foreign country has the decisive influence, or in an international organization consisting of countries or other entities of international public law, if the execution of such a function is connected with authority in handling public affairs and the criminal act was committed in conjunction with such authority.

It is our understanding that this definition includes all levels and subdivisions of the foreign government.

## **Penalties**

Bribery of domestic and foreign public officials by natural persons may be punished by imprisonment of one to five years and/or a monetary fine ranging from 2,000 Czech koruna to CZK5 million (approximately \$50–\$124,000). (Section 161, paragraph 2b, Section 53, Criminal Code.) The guidelines for imposing penalties are contained in Sections 33 and 34 of the Criminal Code. They contain examples for judges to take into account when determining penalties, such as the state of mind of the offender or the nature of the motive for the crime.

Civil sanctions applying to both natural and legal persons apparently are possible under Section 451 of the Civil Code, which provides that the court may render a civil law judgement on the transfer of illegal gains.

The statute of limitations for the offense of bribery of foreign public officials is five years (offenses subject to a maximum prison term of not less than three years). (Section 67, Criminal Code.) The statute of limitations period does not include the period in which the offender could not be tried because of legal impediments, when the of-

fender was abroad, or if there is a conditional stay of criminal prosecution. The period shall be interrupted and a new statute of limitations shall commence where the offender is informed of the alleged offense and a criminal investigation has begun, or if the offender commits a new offense during the statute of limitations period.

Section 55 of the Czech Criminal Code allows for forfeiture of an asset belonging to the offender if the bribe is secured during a criminal proceeding.

## **Books and Records Provisions**

The Accounting Act No. 563/1991 Coll., as amended by the Act No. 117/1994 Coll. and Act No. 219/1997 Coll., governs the maintenance of books and records under Sections 6, 7, 11–16, 29 and 33. The Accounting Act applies to all legal and natural persons carrying on business that are required to report taxes.

## **Money Laundering**

It is our understanding that as with bribery of domestic officials, bribery of foreign officials is a predicate offense for the application of the Czech money laundering legislation. (Section 1, paragraph 2, Act No. 61/1996 Coll. Concerning Certain Measures Against Legalization of Proceeds of Criminal Activity and amendments.)

## **Extradition/Mutual Legal Assistance**

Under Czech law, the Convention will be considered as a basis for extradition and mutual legal assistance. Bribery of foreign public officials is an extraditable offense under Czech law and the extradition treaties to which the Czech Republic is a party. Where no treaty applies, Section 379 of the Code on Criminal Procedure permits extradition of a person in the Czech Republic to a foreign country if the offense is punishable in both countries, extradition is found admissible by a competent Czech court, the statute of limitations has not expired, and the accused is not a Czech national. It is our understanding that the Czech condition for dual criminality will be considered fulfilled between parties to the Convention. Section 382 provides that a permit is required from the Czech Minister of Justice once a competent court has decided upon the admissibility of the extradition. Czech nationals cannot be extradited. (Section 21, Criminal Code.) Under Section 18 of the Criminal Code, Czech law applies to Czech nationals and permanent residents who commit offenses abroad, and such persons can be prosecuted in the Czech Republic.

Mutual legal assistance may be governed by the 1959 European Convention on Mutual Legal Assistance in Criminal Matters. Where no treaty applies, mutual legal

assistance is governed by Section 384 of the Code on Criminal Procedure. Under Section 56 of the Act on International Private and Procedural Law, Czech judicial authorities will grant legal assistance to foreign judicial bodies if the requirement of reciprocity is met. Consultation procedures are determined on a case-by-case basis by the Supreme Prosecution Office at the request of the competent foreign body for the transfer of criminal proceedings. (Section 383, Code on Criminal Procedures.) Also applicable are the 1972 European Convention on Transfer of Criminal Proceedings and Article 21 of the 1959 European Convention on Mutual Assistance in Criminal Matters. In noncriminal matters where no treaty governs, the Act on International Private and Procedural Law will apply, along with the relevant provisions in the bilateral and multilateral mutual legal assistance treaties to which the Czech Republic is a party.

Although Section 38 of the Law No. 21/1992 Coll. on Banks, as amended, provides for bank secrecy, the provisions also state that bank secrecy is not violated where such information is provided relating to criminal proceedings.

### **Complicity, Attempt, Conspiracy**

Section 9, paragraph 2 of the Czech Criminal Code provides that where the offense has been committed collectively by two or more persons, each one shall be held individually liable. Section 10 of the Criminal Code defines “participants” in criminal offenses as persons who intentionally organize, instigate, or assist in crime. Sections 7 and 8 of the Criminal Code govern conspiracy and attempt, respectively. Section 7 concerns “especially serious criminal offenses,” which are defined as offenses punishable by imprisonment of at least eight years. However, bribery of foreign public officials is punishable by imprisonment of five years or less, so apparently Section 7 would not apply.

## **Finland**

Finland signed the Convention on December 17, 1997, and enacted implementing legislation on October 9, 1998. Finland deposited its instrument of ratification with the OECD on December 10, 1998. The implementing legislation entered into force on January 1, 1999.

Sources for this analysis include the new provisions to the Finnish Penal Code, Chapter 16, entitled “Offenses Against Public Authorities,” as well as information from the U.S. embassy in Helsinki.

One concern with the Finnish legislation is that Finland requires dual criminality in order to exercise jurisdiction over Finnish citizens abroad.

### **Basic Statement of the Offense**

The basic statement of the offense of bribing foreign public officials is set forth in Chapter 16 of the Finnish Penal Code, Section 13 on bribery:

(1) A person who to a public official, to an employee of a public corporation, to a soldier, to a person in the service of the European Communities, to an official of another Member State of the European Union, or to a foreign public official, in exchange for his/her actions in service, promises, offers or gives a gift or other benefit, intended to the said person or to another, that affects or is intended to affect or is conducive to affecting the actions in service of the said person, shall be sentenced for bribery to a fine or to imprisonment for at most two years.

(2) A person who in exchange for the actions in service of a public official or another person mentioned in paragraph (1) promises, offers, or gives a gift or other benefit mentioned in the said paragraph to another person, shall also be sentenced for bribery.

Generally, Section 13 provides that persons who intentionally promise, offer, or give gifts or other benefits either directly or indirectly to a foreign public official to affect the behavior of such an official may be imprisoned for a maximum period of two years or fined. The provision is not limited to bribes in the context of international business. Although intermediaries are not specifically mentioned, the provision says that bribes “intended” for public officials are covered. Payments involving third parties are covered under Section 13(2).

### **Jurisdictional Principles**

Finland practices both territorial and nationality jurisdiction. Chapter 1, Section 1 of the Finnish Penal Code provides that Finnish law shall apply to offenses committed in Finland. Pursuant to Section 10 of the same chapter, acts are deemed to have been committed in Finland if the criminal act occurred in Finland or if the consequences of the offense as defined by statute were realized in Finland. Chapter 1, Section 6 of the Finnish Penal Code allows for the prosecution of a Finnish citizen who commits an offense outside of Finland. Chapter 1, Section 11 of the Finnish Penal Code requires dual criminality for offenses committed abroad by a Finn. The provisions on jurisdiction have been part of Finnish Penal law since 1996, and no changes were needed to implement the Convention.

### **Coverage of Payor/Offerrer**

The Finnish legislation covers bribery by any person. It is our understanding that “any person” is to be broadly construed, applying to both natural and legal persons.

### **Coverage of Payee/Offeree**

In Chapter 16, Section 20, of the Finnish Penal Code, a “foreign public official” is defined as

a person who in a foreign State has been appointed or elected to a legislative, administrative or judicial office or duty, or who otherwise performs a public duty for a foreign State, or who is an official or representative/agent of an international organization under public law.

Although the Finnish definition of foreign public official contains no reference to employees of a “public agency or public enterprise” as required by Article 1.4(a) of the Convention, it is our understanding that Section 13 of the Finnish law, the provision containing the basic statement of the offense, does prohibit bribes to employees of public corporations.

### **Penalties**

Under Chapter 16, Section 13, the Finnish law provides for a fine or a two-year maximum prison sentence for persons who have committed bribery of domestic public officials. No amount for the fine is specified. In addition, for “aggravated bribery,” Chapter 16, Section 14 provides that the offender shall be sentenced to a minimum of four months’ and a maximum of four years’ imprisonment. These provisions also apply to the bribery of foreign public officials, so the penalties for domestic and foreign bribery are the same. Statutes of limitations for bribery by natural persons are covered under the Finnish Penal Code Chapter 8, Section 1, which provides that charges must have been brought within five years after the offense for the imposition of a sentence. For aggravated bribery, the statute of limitations is ten years.

Chapter 16, Section 28 of the Finnish Penal Code provides that the provisions on corporate criminal liability apply to bribery and aggravated bribery. Under Penal Code Chapter 9, Section 5, corporations can be fined from a minimum of 5,000 Finnish Markka (approximately \$758) to a maximum of FM5 million (approximately \$758,289). Chapter 9, Section 2 of the Penal Code provides that a Finnish corporation may be fined for the actions of its management representatives or employees, when acting within the scope of their employment on behalf of the corporation or for its benefit, if they act as accomplices in committing an offense or allowed the of-

fense to happen. Section 2(2) states that even if a specific person cannot be identified as the offender, the corporation itself can still be fined.

Penal Code Chapter 9, Sections 4 and 6 set forth illustrative lists of factors that must be taken into account when determining sentencing of a corporation to a corporate fine and calculating the fines for corporations, including the lack of corporate oversight; the position of the offender in the corporation; the seriousness of the offense; the consequences to the corporation due to the commission of the offense; measures, if any, taken by the corporation to prevent the offense from occurring; whether the offender sentenced is part of management; the size of the corporation; the amount of shares held by the offender; and the extent to which the offender can be held personally liable for the commitments of the corporation. For fines, the list also takes into account not only the size of the corporation, but also its solvency, earnings, and other indicators of its financial circumstances.

Chapter 9 provides that if the offender is not sentenced to a punishment due to the statute of limitations, then the corporation on behalf of which he acted cannot be sentenced either. The minimum statute of limitations for corporate fines is five years. Chapter 9, Section 9 provides that the enforcement of any corporate fine will lapse five years from the date the fine was imposed.

Chapter 40, Section 4 of the Finnish Penal Code covers forfeiture of bribes: the gift or benefit or the corresponding value will be forfeited to the State from the bribe recipient or beneficiary. Section 4 applies to passive bribery. We understand that, although the Finnish penal code does not specifically address forfeiture for active corruption, Chapter 2, Section 16 of the Penal Code provides for forfeiture generally and can be applied to offenses of active corruption. We understand that there are no additional civil or administrative sanctions for bribery under Finnish law.

Under Chapter 12, Section 94, paragraph 2 of the Act on Credit Institutions, financial institutions must provide prosecution and investigative authorities all information necessary for crime detection. It is our understanding therefore that bank secrecy should not inhibit mutual legal assistance in criminal matters under the Convention.

### **Books and Records Provisions**

The Finnish law on accounting provisions is covered by the Accounting Act, which applies to natural persons and companies. Chapter 1, Article 1 states that anyone carrying out business or practicing a profession must keep accounting records of such activities.



The Finnish law on offenses for accounting provisions is covered under Chapter 30, Section 9 of the Finnish Penal Code:

If a person with a legal obligation to keep accounts, his/her representative or the person entrusted with the keeping of accounts intentionally (1) neglects in full or in part the recording of business transactions or the balancing of the accounts, (2) enters false or misleading data into the accounts, or (3) destroys, conceals or damages account documentation and in this way essentially impedes the obtaining of a true and sufficient picture of the financial result of the business of the said person or of his/her financial standing, he shall be sentenced for an accounting offense to a fine or to imprisonment for at most three years.

### **Money Laundering**

Money laundering is a crime under Chapter 32, Section 1(2) of the Finnish Penal Code. It covers all assets or property resulting from offenses of the Finnish Penal Code, including bribery of foreign public officials.

### **Extradition/Mutual Legal Assistance**

Section 4 of the Finnish Extradition Act provides that extradition will not be granted unless the request is based upon an act that is an extraditable offense, or the act, if it had been committed in Finland, constitutes an offense for which the penalty is greater than one year. Acts within the scope of Article 1 of the Convention will fulfill the dual criminality requirement, as the Finnish penalty for bribery is a maximum of two years. The Finnish Extradition Act provides that Finnish nationals shall not be extradited. However, under the Extradition Act between Finland and other Nordic countries, Finnish nationals may be extradited to other Nordic countries in some cases. Finland is also a party to the European Convention on Extradition of 1957 and is expected to ratify the 1996 Convention relating to extradition between member states of the European Union soon. After ratification of that convention, Finland will be able, under certain conditions, to extradite Finnish nationals to other European Union states.

We understand that mutual legal assistance is provided for by the Finnish Act on International Legal Assistance in Criminal Matters. Under that act, Finland can provide assistance without the condition of dual criminality, except where coercive measures are requested, unless such measures would be available under Finnish law had the offense upon which the request is based occurred in Finland. Finland has also ratified

the 1959 European Convention on Mutual Legal Assistance in Criminal Matters and its 1978 Protocol.

### **Complicity, Attempt, Conspiracy**

Chapter 5 of the Finnish Penal Code contains provisions on complicity, attempt, and authorization. Under Chapter 5, Section 1, if two or more persons have committed a crime together, they will be punished as principals. If the offense is carried out or attempted, under Chapter 5, Section 2 of the Penal Code, a person who encouraged another in committing the offense will be punished for incitement as a principal. Complicity is covered by Chapter 5, Section 3, which provides that a person who acts to further the crime, whether it is carried out or attempted, will be sentenced under the same provisions as a principal. Finnish law does not specifically criminalize an attempt to bribe a foreign public official, as the basic prohibition already covers promising and offering bribes to such officials. Conspiracy is not punishable under the Finnish Penal Code.

## **Germany**

Germany signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on November 10, 1998. The German legislation entered into force on the same date as the Convention, February 15, 1999.

Sources for this analysis include Germany's implementing legislation, "The Act on the Convention Dated December 17, 1997, on Combating Bribery of Foreign Public Officials in International Transactions," dated September 10, 1998 (ACIB), and reporting from the U.S. embassy in Berlin.

Germany will impose sanctions upon legal persons only where an identifiable natural person employed by the legal person has committed an offense. Although an actual prosecution does not seem to be a prerequisite, this provision may create an impediment to effective enforcement, depending on how Germany applies this provision.

### **Basic Statement of the Offense**

Germany's basic statement of the offense is in two parts. With respect to officials, soldiers, and judges, the ACIB prohibits

bribery concerning a future judicial or official act which is committed in order to obtain or retain for the offender or a third party business or an unfair advantage in international business transactions. [ACIB §2(1).]

Germany implemented the Convention by making judges, officials, and soldiers of foreign governments and international organizations “equal” to domestic judges, officials, and soldiers for purposes of Sections 334 (active bribery), 335 (severe cases of bribery), 336 (omission of public service), and 338 (fine and forfeiture). The basic offense, therefore, is defined in Criminal Code Section 34 as follows:

Whoever offers, promises, or grants an advantage to any official, any person specifically engaged for public service, or any soldier of the Federal Armed Forces, on behalf of such person or for a third party, in return for the performance of a past or future public service and the past or future breach of his official duties, shall be punished.

Unlike the domestic bribery provisions, the implementing legislation applies to “future judicial or official acts.” As Section 334 applies to “offers,” the timing of the payment itself, whether before or after the corrupt act, is not determinative. In addition, the implementing legislation refers to “official acts”; the domestic bribery laws use the term “performance of past or future public service and the past or future breach of his official duties.”

The second prong of the implementing legislation applies to bribery of foreign parliamentarians. The implementing legislation provides in ACIB §2(2) that

Anyone who offers, promises, or grants to a member of a legislative body of a foreign state or to a member of a parliamentary assembly of an international organization an advantage for that member or for a third party in order to obtain or retain for him/herself or a third party business or an unfair advantage in international business transactions in return for the member’s committing an act or omission in future in connection with his/her mandate or functions, shall be punished.

### **Jurisdictional Principles**

Germany applies the principles of both territorial and nationality jurisdiction. Germany will assert jurisdiction when an offender or participant has acted or ought to have acted within its territory or when the “success of the offense” occurs within its territory. (See Criminal Code §§3, 9). In addition, Germany will assert jurisdiction over the acts of its nationals abroad.

### **Coverage of Payor/Offerer**

German law applies to “whoever” offers or pays a bribe, although Germany does not at present provide criminal responsibility for corporations. However, pursuant to Section 30 of the Administrative Offenses Act,

a legal person may be fined when a person acting for the corporation was authorized by or was himself or herself “in a leading position.” It is our understanding that the corporation may be held liable when a person in a leading position fails to properly supervise his subordinates. (See Administrative Offenses Act, §130.)

German law provides that a corporation cannot be held administratively liable if the criminal offense itself cannot be prosecuted for “legal reasons.” It is our understanding that this refers to such legal impediments as the statute of limitations and not mere inability to assert jurisdiction over a culpable individual.

### **Coverage of Payee/Offeree**

The implementing legislation covers payments offered or made to (1) judges of a foreign state or an international court; (2) public officials of a foreign state or “persons entrusted to exercise a public function with or for an authority of a foreign state, for a public enterprise with headquarters abroad, or other public functions for a public state; (3) a public official or other member of the staff of an international organization or a person entrusted with carrying out its functions; (4) a soldier of a foreign state or one who is entrusted to exercise functions of an international organization; and (5) a member of a legislative body or parliamentary assembly of a foreign state or international organization. (See ACIB §2(1)(1).) In addition, German law covers payments made to a third party.

### **Penalties**

As noted, Germany implemented the Convention by adding bribery of foreign officials to its existing domestic bribery statutes. The penalties, therefore, are the same.

Under Sections 334 and 335, bribery of a public official is punishable under a three-tier system: “less severe offenses” earn a prison term of up to two years, or a fine; “general” offenses earn a prison term of three months to five years; “particularly severe cases” earn a prison term of one to ten years.

There is no statutory definition of “less severe offenses.” A “particularly severe case” is one that “concerns an advantage of large proportions,” where the perpetrator “continuously accepts advantages which he requested in return for the future performance of a public service,” and where the perpetrator “conducts the activity as a business or as a member of a gang, which he joined in order to continuously commit such acts.”

As noted, corporations are not subject to criminal liability. However, they may be prosecuted administratively and subjected to fines under the Administrative

Offenses Act. The statutory fines on corporations are up to DM1 million (approximately \$461,000) for intentional acts by a leading person and up to DM500,000 (approximately \$231,000) for negligent acts. (*See Administrative Offenses Act*, §30.) However, it is our understanding that corporations can be subject to fines up to the amount of the commercial advantage. (*See Administrative Offenses Act*, §17(4).) We have not received any information on how often this provision has been invoked against German corporations.

It is our understanding that both the bribe and the proceeds of bribery are forfeitable under the Criminal Code, Section 73. However, in the case of corporations, a corporation cannot both be fined and subjected to an order of forfeiture.

### **Books and Records Provisions**

We understand that Germany's laws prohibit the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents to justify book entries. These prohibitions are principles to which a corporation must adhere to meet the legal requirement that it conform with legal norms.

### **Money Laundering**

Bribery is a predicate offense for Germany's money laundering provision. (*See Criminal Code* §261.) As with domestic bribery, however, bribery committed within German territory is always a predicate offense, whereas bribery committed abroad is only a predicate offense if it is also punishable at the place of the offense.

### **Extradition/Mutual Legal Assistance**

Pursuant to bilateral agreements and various European conventions, Germany will render mutual legal assistance in investigations of foreign bribery. Germany also has a law permitting non-treaty-based mutual legal assistance.

Pursuant to the Convention, bribery of a foreign public official is an extraditable offense. The United States has an extradition treaty in force with Germany. However, the German Basic Law prohibits the extradition of its nationals.

### **Complicity, Attempt, Conspiracy**

Attempt and complicity are both covered by German law. (*See Criminal Code* §§25(2), 26, 27, and 334 and ACIB §1(2).)

## **Greece**

Greece signed the Convention on December 17, 1997, and ratified it on November 5, 1998. It deposited its instrument of ratification with the OECD on February 5, 1999. Greece's implementing legislation was adopted on November 5, 1998, and became effective on December 1, 1998.

Sources for this analysis include Greek Law 2656/1998 implementing the Convention, as well as other information obtained by the U.S. embassy in Athens.

Under Article 28 of the Greek Constitution, generally approved rules of international law and international conventions that have been ratified under Greek law form an integral part of domestic Greek law and supersede any existing conflicting law, to the extent that they do not conflict with the Constitution. Accordingly, the Convention became an integral part of Greek law when Greece enacted Law 2656/1998 ratifying the Convention and including specific provisions to criminalize bribery of foreign public officials.

### **Basic Statement of the Offense**

The basic statement of the offense is set forth in Article 2(1) of Law 2656/1998:

Any person who, in the conduct of international business and in order to obtain or retain business or other improper advantage, promises or gives, whether directly or through intermediaries, any undue gift or other advantage, to a foreign public official, for that official or for a third party, in order that the official act or refrain from acting in relation to the performance of official duties, is punished with imprisonment of at least one year.

### **Jurisdictional Principles**

Although the statute itself does not contain any information about jurisdictional principles, Greek law provides for both territorial and nationality jurisdiction. Article 5 of the Greek Criminal Code provides that Greece follow the principle of territoriality: Greek criminal laws apply to all acts committed in Greek territory, either by Greeks or other nationals. Article 16 generally defines the place where acts are committed as the place where the act or omission was carried out in whole or in part. It is our understanding that if only part of the act in furtherance of the bribery took place in Greece, the crime would still fall within Greek jurisdiction. Article 6 of the Criminal Code provides that Greek criminal laws apply to criminal acts committed abroad by a Greek national if the act is punishable under the laws of the country in which it occurs.

## **Coverage of Payor/Offeror**

Article 2 covers bribery by “any person,” but does not describe what persons or entities are covered by this term. It is our understanding that “any person” means any individual.

Under Article 71 of the Greek Civil Code, legal entities are generally responsible for the acts or omissions of their representatives, meaning those in management positions, in carrying out the legal entities’ functions. Greek law does not provide for criminal responsibility for legal entities. Therefore, corporations are subject only to administrative penalties (see below). It is unclear to what extent a corporation could be held responsible for bribes involving lower-level employees. It appears that under Criminal Code Article 922, the company may also be held responsible in some circumstances for acts and omissions of its employees and auxiliary personnel whose positions have been prescribed by the company’s bylaws and when acting in the scope of their positions.

## **Coverage of Payee/Offeree**

The statute itself does not define “foreign public official.” However, it is our understanding that the statute incorporates the definitions found in the Convention and Official Commentaries, and specifically that Convention Article 4(a) containing the definition of “foreign public official” and Commentary footnotes 14–18 apply. It is our understanding that the definition of a foreign public official will be interpreted in light of the definitions of domestic public officials under the Greek Criminal Code, Articles 13 and 263(a), which is even broader than the Convention definition.

## **Penalties**

Although Law 2656 states that any person who bribes a foreign public official “is punished with imprisonment of at least one year,” it is our understanding that the law is to be read in conjunction with Criminal Code Articles 235 and 236 on bribery of domestic officials, which provide that the penalty for bribery may range between one and five years. There do not appear to be any fines for individuals for the bribery of domestic or foreign public officials.

As stated above, the Greek judicial system does not recognize criminal responsibility for legal entities. Article 5 provides three kinds of administrative penalties for a company whose managerial employees violate the law: fines of up to three times the value of any benefit that it has received, temporary or permanent prohibition from doing business, or provisional or permanent exclusion from state grants or incentives. Article 2(2) provides for the

confiscation of the bribe or the value of the bribe. Article 76 of the Greek Code of Criminal Procedure provides for confiscation of the proceeds of a crime. Also, if an act violates the anticorruption laws as well as Article 2(1) of Law 2331/1995 concerning money laundering, then paragraphs 6–10 of that article on the confiscation of goods will also apply. Goods may also be seized during the criminal investigation/inquiry under the Code of Criminal Procedure Articles 258, 259, 260, 261, 266, 288, and 495.

Under Articles 111, paragraphs 3 and 112 of the Criminal Code, the statute of limitations in general for acts of bribery, as for all crimes, is five years after the commission of the act.

## **Books and Records Provisions**

Books and records are covered by Greece’s Accounting Code. Violations of the code are punished under Law 2523/1997, which provides for both criminal and civil sanctions. If the violations in question are committed in furtherance of a bribe to a foreign public official, Article 3 of Law 2656/1998 also applies. Article 3 specifically prohibits off-the-books business accounts, false book-keeping entries, or false documents and provides for a three-year prison term for such offenses, unless a longer term would apply pursuant to another provision of Greek law. Article 4 of Law 2656/1998 gives the authority to investigate violations of Article 3 to the Greek Financial and Economic Crimes Office.

## **Money Laundering**

Bribery of foreign public officials is a predicate offense for the application of the Greek money laundering Law 2331/1995, as is the case with domestic bribery, without regard to where the bribe occurred.

## **Extradition/Mutual Legal Assistance**

Greece has an extradition treaty with the United States that has been in effect since 1932. The treaty includes bribery as an extraditable offense. Generally, under Article 437 of the Code of Criminal Procedure, extradition is permitted if the maximum prison sentence for the act upon which the extradition request is based exceeds two years under both Greek law and the law of the country requesting extradition. Bribery of foreign public officials is an extraditable offense because, as noted above, the maximum prison sentence is five years. The Convention will serve as the legal basis for extradition for the offense of bribery of foreign public officials. Under Article 428 of the Code of Criminal Procedure, Greece cannot extradite its own citizens.

The Greek government will offer mutual legal assistance in accordance with the European Convention on

Mutual Legal Assistance concerning criminal acts, and in accordance with its bilateral mutual assistance treaties. Article 7 of Law 2656/1998 gives the authority for purposes of Convention Article 4 on jurisdiction to the Greek Ministry of Justice.

### **Complicity, Attempt, Conspiracy**

It is our understanding that the Greek Criminal Code Articles 45–49 on complicity and aiding and abetting apply to bribery of foreign public officials.

## **Hungary**

Hungary signed the OECD Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 4, 1998. Hungary's implementing legislation entered into force on March 1, 1999.

Our primary source for this analysis is the implementing legislation contained in Title VIII of the Hungarian Criminal Code (Crimes Against the Purity of International Public Life), dated December 22, 1998.

Two major concerns arise from Hungary's implementation of the Convention. First, Hungary currently provides for neither criminal nor civil liability for legal persons. Second, Hungarian law includes a defense for bribes that are solicited by the official and are paid only to avoid an "unlawful disadvantage." In our view, these matters must be addressed for Hungary to fully implement the Convention. In addition, we are concerned that Hungary's three-year statute of limitations is too short and may not fulfill the Convention requirement of an adequate period of time for investigation and prosecution.

The OECD public website indicates that Hungary is currently preparing draft amendments to be submitted to Parliament in Autumn 2000 to correct several deficiencies in its legislation, including its statute of limitations, eliminating the defense of "unlawful disadvantage" and the sanctioning of legal persons.

### **Basic Statement of the Offense**

The basic prohibition for bribery of public officials is Section 258/B of the Hungarian Criminal Code (HCC):

(1) The person who gives or promises a favor to a foreign official person or with regard to him to another person, which may influence the functioning of the official person to the detriment of the public interest, commits a misdemeanor and shall be punishable with imprisonment of up to two years.

(2) The briber shall be punishable for a felony with imprisonment of up to three years, if he gives

or promises the favor so that the foreign official person violates his official duty, exceeds his competence, or otherwise abuses his official position.

(3) The perpetrator of the crime defined in subsection (1) shall not be punishable, if he gave or promised the favor upon the initiative of the official person because he could fear unlawful disadvantage in case of his reluctance.

### **Jurisdictional Principles**

Hungary applies the principles of territorial and nationality jurisdiction. (*See* HCC §3.) In addition, our translation of Hungary's law states that Hungary will apply its law to non-Hungarian citizens abroad, if the acts are violative of Hungarian law and the law of the place of perpetration. (*See* HCC §4.) The statute of limitations for bribery of a foreign public official is three years.

### **Coverage of Payor/Offerrer**

The Hungarian statute applies to "person[s]." Hungarian law does not provide for criminal responsibility of legal persons. We are not aware of any administrative or civil sanctions that may be imposed on legal persons for bribery.

### **Coverage of Payee/Offeree**

A foreign official person is defined in the statute to include the following (*see* HCC §258/F(1)):

- A person holding a legislative, administrative or judicial office in a foreign state.
- A person at an organ or body entrusted with public power or public administration duties or who fulfills tasks of public power or state administration.
- A person serving at an international organization constituted by international treaty, whose activity forms part of the proper functioning of the organ.
- A person elected to the assembly or other elected body of an international organization that is constituted by international treaty.
- A member of an international court with jurisdiction over the Republic of Hungary or a person serving the international court, whose activity forms part of the proper functioning of the court.

### **Penalties**

The penalties for bribery of a foreign public official are up to two years for purchasing influence and up to three years where the bribe was intended to induce the official to violate his official duty, exceed his competence, or otherwise abuse his official position. These

penalties are identical to those for domestic bribery. (Compare HCC §§253, 258/B.) In addition, Hungary authorizes the confiscation of property “which was obtained by the perpetrator during or in connection with the commission of the crime.” (HCC §62, 63.) In addition, the law provides for the confiscation of instrumentalities of crime. (*See* HCC §§77, 77/A.)

Although Hungary does not provide for criminal responsibility of a legal person, it does provide that an officer of a business association may be barred from being an “executive officer of a business association until relieved of the detrimental legal consequences related to his criminal record.” (Act CXLIV of 1997 on Business Associations, §23.) In addition, such a person may be barred from being an executive officer in a particular profession for up to three years. (*See id.*)

### **Books and Records Provisions**

Act XVIII of 1991 on Accounting defines the reporting and bookkeeping obligation of economic organizations. In addition, tax provisions include detailed regulations concerning the verification, accounting, and registration of incomes and costs arising in connection with the activity of the enterprise.

### **Money Laundering**

Foreign and domestic bribery are predicate offenses for Hungary’s money laundering offense. (*See* HCC §303.)

### **Extradition/Mutual Legal Assistance**

Hungary will extradite non-nationals provided there is dual criminality. (*See* HCC §11.) Hungary will extradite Hungarian nationals only if the person holds dual nationality and is a resident of a foreign state. (*See* HCC §13.)

Hungary has both an extradition treaty and a mutual legal assistance treaty with the United States, both of which entered into force in 1997. Hungary will provide mutual legal assistance provided that doing so will not “prejudice the sovereignty, security, or public order of the Republic of Hungary” (Act XXXVIII of 1996 on International Legal Assistance in Criminal Matters, §2).

### **Complicity, Attempt, Conspiracy**

Hungarian law covers attempt and abetting. (*See* HCC §§16–21.)

## **Iceland**

Iceland has implemented the Convention by enacting Act No. 147/1998, amending its General Penal Code, and Act No. 144/1998, on the Criminal Liability of Le-

gal Persons on Account of Bribery of Public Officials. Both laws were passed on December 22, 1998, and went into effect on December 30, 1998. Act No. 147/1998 amended Section 109 of the General Penal Code to fully equate bribery of a foreign public official or an official of a public international organization with bribery of a domestic public official.

### **Basic Statement of the Offense**

Section 109 of the General Penal Code provides:

(1) Whoever gives, promises or offers a public official a gift or other advantage in order to induce him to take an action or to refrain from an action related to his official duty, shall be imprisoned for up to three years, or, in case of mitigating circumstances, fined.

(2) The same penalty shall be ordered if such a measure is resorted to with respect to a foreign public official or an official of a public international organization in order to obtain or retain business or other improper advantage in the conduct of international business.

Section 18 of the General Penal Code requires intent for all criminal actions; therefore bribery of a foreign public official must be intentionally committed.

### **Jurisdictional Principles**

Iceland’s law provides for both territorial and nationality jurisdiction. Chapter 2 of the General Penal Code allows for prosecution of any offense committed, in part or in whole, in Iceland. The General Penal Code requires only that a significant number of the elements be traced to Iceland. Under Section 7 of the General Penal Code, an offense is deemed to have been committed where its consequences are actual or deliberate.

Section 5 of the General Penal Code allows Iceland to prosecute its nationals for crimes committed abroad if the acts were also punishable under the law of the nation where committed. However, under Section 8 of the General Penal Code, the penalties for such offenses are limited to those of the country where the crime is committed. We understand that the statute of limitations for bribery of foreign public officials is five years with respect to both natural persons and legal persons.

### **Coverage of Payor/Offender**

Iceland’s General Penal Code applies to whoever offers or pays a bribe, without reference to nationality. Legal entities are also covered under Act No. 144/1998 on the Criminal Liability of Legal Persons on Account of Bribery of Public Officials.

## Coverage of Payee/Offeree

“Foreign public official” is not specifically defined in the General Penal Code. However, the explanatory notes to the act amending Section 109 of the General Penal Code expressly state that the term “foreign public official” is meant to have as broad a scope as in the Convention. Furthermore, the explanatory notes state that the law will be interpreted in conformity with the Convention.

## Penalties

Under Section 109 of the General Penal Code, the maximum prison sentence for bribery of a domestic or foreign public official is three years. Fines may be assessed in certain circumstances.

Act No. 144/1998, on Criminal Responsibility of Legal Persons on Account of Bribery of Public Officials, provides that a legal person may be fined if its employee gives, promises, or offers a domestic or foreign public official a gift or advantage to induce acts or omissions as part of the recipient’s official duties. Icelandic law provides for criminal responsibility of legal persons. In May 2000 the maximum limit on fines for legal persons was removed.

The Code of Criminal Procedure allows for the seizure of “objects” if obtained by criminal means under Section 78. “Objects” include documents, money, and proceeds. Iceland’s implementing legislation does not provide for civil or administrative penalties for bribery of a foreign public official.

## Books and Records Provisions

Section 1 of the Business Records Act requires all businesses, regardless of form, to maintain clear records. Section 6 of the Business Records Act requires businesses to maintain records in such a manner as to make all transactions traceable. Section 36 of the Business Records Act makes a violation of any part of the act a criminal offense. Violators may be fined and, in serious cases, imprisoned for a period not to exceed six years.

## Money Laundering

Bribery of a foreign public official or a domestic official is a predicate offense for the application of Iceland’s money laundering law found in Section 264 of the General Penal Code. Where the bribe occurred is not a relevant consideration.

## Extradition/Mutual Legal Assistance

Act 13/1984 on Extradition of Criminal Offenders and Other Assistance in Criminal Matters (Extradition

Act) allows the extradition of any suspect so long as the alleged act is punishable under Icelandic law by a prison term of at least one year. However, the extradition of nationals of Iceland is forbidden under Section 2 of the Extradition Act.

The Extradition Act also governs mutual legal assistance. Under the Extradition Act, Iceland will render legal assistance regardless of the applicable penalty. The Code of Criminal Procedure sets forth the procedures for rendering legal assistance to foreign states.

## Complicity, Attempt, Conspiracy

Section 20 of the General Penal Code provides that any attempt to commit a crime is punishable. Under Section 22 of the General Penal Code, all accomplices to an offense under the General Penal Code are criminally liable. Section 70 of the General Penal Code provides that when two people commit a crime, both may be prosecuted for the commission of the crime. In addition, under Section 70, acting together to commit a crime is regarded as an aggravating factor. We understand that conspiracy *per se* could constitute a criminal offense only under certain circumstances.

## Japan

Japan signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on October 13, 1998. Implementing legislation was adopted on September 18, 1998, and entered into force on February 15, 1999, when the Convention itself entered into force for Japan.

Japan’s legislation to implement the Convention is found in amendments to the Unfair Competition Prevention Law (Law No. 47 of May 19, 1993) (UCPL), rather than the Penal Code, where domestic bribery laws are found. The penalties are criminal, however. Provisions of the Penal Code apply generally to all crimes unless specified otherwise.

Sources for this analysis include the UCPL, provisions of the Penal Code and other Japanese laws, information obtained from the government of Japan through diplomatic exchanges, and reporting from the U.S. embassy in Tokyo.

There are concerns as to whether the maximum fines for natural and legal persons are “effective, proportionate and dissuasive,” as Article 3(1) of the Convention requires. There is also a concern that Japan will not subject the proceeds of bribery to confiscation, nor will it impose monetary sanctions of comparable effect (other than the criminal fines that otherwise apply to bribery) in lieu of such

confiscation, as required under Convention Article 3(3). The “main office” exception to territorial jurisdiction is problematic, as is the fact that bribery is not included among the crimes subject to the application of nationality jurisdiction. Other concerns relate to the definition of “foreign public official,” coverage of payments made to a third party at the direction of a foreign public official, and the length of the statute of limitations.

### Basic Statement of the Offense

Article 10 *bis* (1) of the UCPL provides:

No person shall give, offer or promise any pecuniary or other advantage to a foreign public official, in order that the official act or refrain from acting in relation to the performance of official duties, or in order that the official, using his position, exert upon another foreign public official so as to cause him to act or refrain from acting in relation to the performance of official duties, in order to obtain or retain improper business advantage.

Article 10 *bis* (1) does not include the element of intent. Intent is generally an element in all criminal offenses pursuant to Article 38 of the Penal Code. Article 8 provides that general provisions such as Article 38 apply to crimes under statutes other than the Penal Code. Article 10 *bis* (1) does not address bribes offered, promised, or given through intermediaries, nor bribes paid, on behalf of a public official, to a third party.

### Jurisdictional Principles

Article 10 *bis* of the UCPL does not address basic jurisdictional principles. However, Article 1 of the Penal Code sets forth the principle of territoriality. We understand that in order to establish jurisdiction, at least one element of the offense must be committed in Japan. Pursuant to Article 8 of the Penal Code, the provisions of Article 1 apply to the UCPL.

Under Article 10 *bis* (3) of the UCPL, Article 10 *bis* (1) does not apply if the country of the foreign official who is the bribe recipient is the same country in which the “main office” of the briber is located. Under this exception, therefore, a bribe transaction that occurred in whole or in part in Japan would not be covered under the UCPL if the briber’s “main office” were located in a certain country and the bribe recipient were an official of the government of that same country.

Under Article 3 of the Penal Code, nationality jurisdiction is applied only for specified crimes: arson, forgery, rape, murder, bodily injury, kidnapping, larceny, rob-

bery, fraud, extortion, or embezzlement. Bribery, either domestic or foreign, is not included.

The statute of limitations for active bribery of foreign officials, like bribery of domestic officials, is three years. Article 250 of the Code of Criminal Procedure prescribes a three-year statute of limitations for offenses with a potential sentence of less than five years. Article 255 *bis* (1) provides that the statute of limitations does not run during the period in which the offender is outside Japan.

### Coverage of Payor/Offeror

Article 10 *bis* (1) prohibits conduct by any “person,” without reference to nationality.

### Coverage of Payee/Offeree

In Article 10 *bis* (2), “foreign public official” is defined to include:

- Persons engaged in public service for a national or local government in a foreign country.
- Persons engaged in service for an entity constituted under foreign special laws to carry out specific tasks in the public interest.
- Persons engaged in business operations in which more than half of the stock or capital is held directly by a foreign government, or in which the majority of the executives are appointed by a foreign government, and that have been granted special privileges by a foreign government.
- Persons engaged in public service for an international organization.
- Persons exercising a public function that falls under the competence of and is delegated by a foreign government or international organization.

This definition of “foreign public official” does not address indirect government control of an enterprise, nor cases of *de facto* control where the government holds less than 50 percent of the shares of an enterprise.

Under Articles 197 and 198 of the Penal Code, laws against active and passive domestic bribery apply in cases in which a person is bribed in anticipation of becoming a public official, if that person actually becomes a public official. It is not clear whether this applies equally to bribery of a foreign public official.

### Penalties

Under Article 14 of the UCPL, legal persons can be held criminally liable. Article 14 provides that the maximum fine for legal persons is 300 million yen (approximately \$2.8 million). There is no comparable penalty for domestic bribery because the Penal Code, which cov-



ers domestic bribery, does not provide for criminal liability of legal persons.

Under Article 13, the penalties for natural persons are imprisonment for up to three years or a maximum fine of ¥3 million (approximately \$27,500). The corresponding penalties in Article 198 of the Penal Code for domestic bribery are imprisonment for up to three years or a maximum fine of ¥2.5 million (approximately \$22,900). According to the Japanese legislation, a fine or imprisonment can be applied in the alternative, but not together.

Article 19 of the Penal Code provides for confiscation of the bribe or its monetary equivalent. Under the recently enacted Anti-Organized Crime Law, if there has been a conviction under Article 10 *bis* (1) UCPL, the judge has discretion to confiscate “any property given through a criminal act.” Japanese law does not provide for confiscation of the proceeds of bribery, or monetary sanctions of comparable effect. Nor does Japanese law contain other civil or administrative sanctions for bribery of a foreign public official.

### **Books and Records Provisions**

Companies and partnerships with capital equal to or exceeding ¥500,000 (approximately \$4,590) must, under Article 32 *bis* (1) of the Commercial Code, keep accounts and balance sheets that reflect the condition of the business and profits/losses. Such accounts must be kept in accordance with the requirements of the Financial Accounting Standards for Business Enterprises. Under Article 498 *bis* (1) of the Commercial Code, directors and others administering the affairs of a company are subject to non-criminal fines of up to ¥1 million (approximately \$9,170) for falsification of records.

Articles 281 and 282 of the Commercial Code contain certain requirements for the maintenance of financial records by companies that issue shares of stock. Under Article 266 *bis* (3), directors are liable for falsifying audit reports, prospectuses, etc. Share-issuing companies with capital of ¥500 million (approximately \$4.6 million) or more, or total liabilities of ¥20 billion (approximately \$183 million) or more, must be audited by external auditors pursuant to Article 2 of the Law for Special Exceptions to the Commercial Code.

Companies that issue securities listed on a stock exchange are covered by the Securities and Exchange Law (SEL). Article 207 of the SEL provides that balance sheets, profit and loss statements, and other documents relating to financial accounting are to be prepared in accordance with the requirements prescribed by the Min-

istry of Finance. Under Article 207 (2), such records must be audited by independent auditors. Under Article 30 of the Certified Public Accountants Law, accountants who falsely certify the correctness of financial documents are subject to administrative sanctions.

Article 197 (1) of the SEL provides for criminal penalties (imprisonment for up to five years and/or fines of up to ¥5 million (approximately \$45,900) ) for persons who submit false registration statements. The corporation may also be penalized under Article 207. Individuals submitting false registration statements may also, under Article 18 of the SEL, be held civilly liable to injured investors.

### **Money Laundering**

Under the Anti-Organized Crime Law, the acceptance of a bribe by (but not the act of bribing) a domestic or foreign official is a predicate offense for the purpose of Japan’s money laundering laws. Penalties include imprisonment for maximum terms of three to five years, or fines ranging from a maximum of ¥1 million to ¥10 million (approximately \$9,170–\$91,700).

### **Extradition/Mutual Legal Assistance**

Under the U.S.-Japan extradition treaty, bribery is an extraditable offense so long as it is punishable in both countries by imprisonment for a period of more than one year. The treaty provides that extradition of a party’s nationals is discretionary. The United States and Japan do not have a mutual legal assistance treaty. (One is currently under negotiation.) Japan can provide legal assistance to other countries under the Law for International Assistance in Investigation (dual criminality is required) and the Law for Judicial Assistance to Foreign Courts.

### **Complicity, Attempt, Conspiracy**

Complicity is governed by Articles 61–65 of the Penal Code. Article 61 pertains to instigation of criminal acts. Aiding and abetting the commission of an offense is covered under Article 62. Neither the Penal Code nor the UCPL criminalizes attempted bribery. Under Article 60, conspiracy is punishable if a coconspirator carries out the criminal act. These provisions apply equally to offenses under the UCPL.

## **Korea**

Korea signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on January 4, 1999. The implementing legisla-

tion entered into force on February 15, 1999. Sources for this analysis include the Foreign Bribery Prevention Act in International Business Transactions of 1998 (FBPA) and diplomatic reporting from the U.S. embassy in Seoul.

One concern with the Korean legislation is that currently neither domestic or foreign bribery is a predicate offense to Korean money laundering legislation. However, we understand that Korea will enact new legislation so that bribery will be a predicate offense.

### **Basic Statement of the Offense**

Article 1 sets forth the purpose of the FBPA, which is to contribute to the establishment of sound practice in international business transactions by criminalizing bribery of foreign public officials and providing the details necessary for implementing the OECD Convention. The basic statement of the offense of bribery is contained in the FBPA's penalty provisions for natural (Article 3) and legal (Article 4) persons. Article 3, "Criminal Responsibility of Bribery," provides that

Any person, promising, giving or offering [a] bribe to a foreign public official in relation to his/her official business in order to obtain [an] improper advantage in the conduct of international business transactions, shall be subject to [penalties].

We understand that under Korean law generally a bribe is "any undue advantage in relation to a public official's duty or business." Furthermore, it is our understanding that although its implementing law does not explicitly include liability for payments for the benefit of third parties, the Korean law does cover situations in which payments are made to a third party for the benefit of a public official and in which payments are made to a public official for the benefit of a third party.

Article 4 covers such bribes on behalf of a legal person by a "representative, agent, employee or other individual working for [a] legal person...in relation to its business." There are two exceptions to the basic statement of the offense. Article 3(2) provides an exception for (1) bribes where they are "permitted or required by the law" in the country of the foreign public official and (2) facilitating payments.

### **Jurisdictional Principles**

Article 2 of the Korean Criminal Code provides for territorial jurisdiction. Jurisdiction will be established over any offense that has been committed in the territory of the Republic of Korea. Article 3 of the Korean Crimi-

nal Code allows Korea to prosecute its nationals for offenses committed abroad (nationality jurisdiction). Article 6 of the Korean Criminal Code confers Korean jurisdiction over any offenses in which the Republic of Korea or a Korean national is a victim.

### **Coverage of Payor/Offerer**

Article 3 covers bribes made by "any person," without reference to nationality. Article 4 of the FBPA provides for criminal responsibility of legal persons.

### **Coverage of Payee/Offeree**

"Foreign public officials" are defined in Article 2 of the FBPA. Article 2 covers officials, whether appointed or elected, in all branches of government, at either the national or local level. The FBPA covers all foreign public officials who perform public functions, such as those in "business, in the public interest, delegated by the foreign government," people "working for a public organization established by law to carry out specific business in the public interest," officials of public international organizations, and persons working for companies "over which a foreign government holds over 50 percent of its subscribed capital" or over which the government exercises "substantial control." Article 2(2)(c) of the FBPA provides an exception for employees of businesses that operate on a "competitive basis equivalent to entities of [an] ordinary private economy [sic]" and that do not receive "preferential subsidies or other privileges."

### **Penalties**

For individuals, Article 3(1) of the FBPA provides for a maximum prison sentence of five years or a maximum fine which is the greater of 20 million won (approximately \$17,900) or twice the profit obtained as a result of the bribe. Article 3(3) provides that where imprisonment is imposed, "the prescribed amount of fine shall be concurrently imposed." The stated intent of Article 3(3) of the FBPA is to effectively deprive the offeror/payor of the profits obtained from the bribery. Under Article 132 of the Korean Criminal Code, the criminal penalty for bribery of domestic public officials is imprisonment for a maximum of five years or a maximum fine of 20 million won (approximately \$17,900).

In addition to the fines imposed on representatives, agents, employees, or other individuals working for legal persons under Article 3, the entity itself may be fined under Article 4 where a representative, agent, or other employee of the legal entity, in the ordinary conduct of

the business of the legal entity, commits the offense of bribery of a foreign public official. Article 4 of the FBPA provides for a maximum fine which is the greater of 1 billion won (approximately \$895,660) or twice the profit obtained as a result of the bribe. The same provision provides that fines will not be imposed if the legal person has paid “due attention” or has made “proper supervisory efforts” toward preventing the violation.

Article 5 of the FBPA provides for confiscation of bribes in the possession of the briber or another person who has knowledge of the offense. (It is our understanding the Korea has indicated that the language “after the offense has been committed” which appeared in the original Article 5 had been inserted mistakenly and is to be deleted). However, the bribe proceeds are not subject to confiscation. Instead, the FBPA in Articles 3 and 4 provides for a fine up to twice the profits obtained through bribery of a foreign public official (see above). Under Article 249 of the Criminal Procedures Act, the statute of limitations for the bribery of foreign public officials under the act is five years. Article 253 of the Criminal Procedures Act provides that when a prosecution is initiated against one of the offender’s accomplices, or the offender remains overseas to circumvent punishment, the statute of limitations is suspended.

### **Books and Records Provisions**

It is our understanding that under Korean law, firms must prepare financial statements in accordance with Korean accounting standards, which prohibit off-the-books transactions and accounts. The accounting standards require all financial transactions to be recorded on the basis of objective documents and evidence. We understand in addition that Korea’s External Audit Law obligates auditors to report fraud on the part of managers to shareholders and a statutory auditor. Korea’s regulatory authorities can bring administrative measures against firms and auditors for material omissions, falsifications, and fraud.

Administrative penalties may include the suspension of licenses and the issuance of securities. Firms and auditors may, in some circumstances, be subject to criminal sanctions pursuant to the External Audit Law.

### **Money Laundering**

Convention Article 7 requires that each party that has made bribery of domestic public official a predicate offense for the purpose of the application of its money laundering legislation shall do so on the same terms for the bribery of a foreign public official. Currently, bribery of neither domestic nor foreign officials is a predi-

cate offense for the application of Korean money laundering legislation.

### **Extradition/Mutual Legal Assistance**

It is our understanding that Korea’s Extradition Act provides for granting extradition requests on a reciprocal basis even in the absence of a treaty, but reserves discretionary authority to the government to deny extradition in cases involving a Korean national. We understand that dual criminality is a mandatory condition for extradition under the Korean Extradition Act, but that Korea may deem the requirement of dual criminality fulfilled if the offense falls within the scope of Article 1 of the Convention.

Under its International Mutual Legal Assistance in Criminal Matters Act, Korea requires reciprocity before it will provide mutual legal assistance to countries with which it does not have mutual legal assistance treaties. In the absence of contrary treaty provisions, Korea further requires dual criminality. It is our understanding that the requirement of dual criminality will be met for requests made within the scope of the Convention. Banking records may be obtained by court warrant under the International Mutual Legal Assistance in Criminal Matters Act and the Act on Real Name Financial Transaction and Protection of Confidentiality.

### **Complicity, Attempt, Conspiracy**

Complicity is covered under the Korean Criminal Code, which categorizes the offense as coauthoring, abetting, and aiding. Article 30 of the Korean Criminal Code provides that when two or more persons jointly commit an offense, each person shall be punished as an author. Article 31(1) of the Korean Criminal Code provides that any person who abets another person in committing an offense shall be subject to the same criminal liability as that of the actual offender. Article 32 of the Korean Criminal Code provides that any person who aids another person’s commission of an offense shall be punished by a penalty, which shall be less than that of the author. Article 8 of the Korean Criminal Code links the above provisions to the FBPA by making them applicable to offenses enumerated in other criminal statutes.

### **Mexico**

Mexico signed the Convention on December 17, 1997, and deposited its instrument of ratification on May 27, 1999. Mexico’s implementing amendments to the Federal Penal Code came into force on May 18, 1999.

Mexico's implementation of the Convention raises three concerns. First, Mexico has made prosecution of corporations contingent upon prosecution of a natural person, thus creating a potential bar to prosecution if such a person evades Mexican jurisdiction or is otherwise not subject to prosecution. Second, Mexico has not adopted an autonomous definition of "public official," thus making its prosecutions dependent upon a foreign state's law. Finally, Mexico's penalties for natural persons are based upon multiples of the daily minimum wage and are grossly inadequate when applied to executives of companies engaged in international business.

### **Basic Statement of the Offense**

The basic statement of the offense is contained in Article 222 *bis* of the Federal Penal Code:

The same penalties provided in the previous article shall be imposed on [a person] who, with the purpose of retaining for himself/herself or for another party, undue advantages in the development or conducting of international business transactions, offers, promises, or gives, whether by himself/herself or through a third party, money or any other advantage, whether in assets or services:

1. To a foreign public official in order that he/she negotiates or refrains from negotiating the carrying out or the resolution of issues related to the functions inherent to his/her job, post, or commission;

2. To a foreign public official in order to perform the carrying out or the resolution of any issue that is beyond the scope of the inherent functions to his/her job, post, or commission...

### **Jurisdictional Principles**

Mexico asserts both territorial and nationality jurisdiction. (*See* Penal Code §§1, 2(1), 4.) Mexican law applies when the promise, offer, or giving of the bribe occurs within Mexico or when extraterritorial conduct is intended to have an effect in Mexico. Mexico also asserts jurisdiction over crimes committed in a foreign territory by a Mexican or by a foreign national against a Mexican provided there is dual criminality. Mexico would not have jurisdiction over the extraterritorial acts of a Mexican corporation unless the natural person who commits the offense on behalf of the corporation otherwise comes within its jurisdiction.

### **Coverage of Payor/Offerrer**

Article 222 *bis* applies to any individual responsible for the offense. Mexican law imposes only derivative li-

ability on corporations. Thus, a court may impose sanctions on a corporation only after a member or representative of the corporation has been convicted of committing the bribery offense using means provided by the corporation and in the name of or on behalf of the corporation. (*See* Penal Code §11.)

### **Coverage of Payee/Offeree**

Mexican law defines a foreign official as "any person displaying or holding a public post considered as such by the applicable law, whether in legislative, executive, or judicial branches of a foreign State, including within autonomous, independent regions, or with major state participation agencies or enterprises, in any governmental order or level, as well as in any international public organization or entity." (*See* Penal Code §222 *bis*.) This definition, by its reference to "applicable law," raises a question as to whether Mexico has adopted the autonomous definition required by the Convention.

### **Penalties**

For natural persons, Mexican law imposes the same penalties for foreign bribery as it does for domestic bribery. These penalties depend on the size of the advantage obtained or promise made and range from imprisonment of between three months and twelve years, a fine of \$108–\$1,800 (500 times the daily minimum wage), and dismissal and debarment from holding a public job from three months to twelve years. (*See* Penal Code §222.) In addition, upon conviction, the instruments and the proceeds of the crime are subject to mandatory forfeiture. When, however, those instruments and proceeds are in the hands of a third party, forfeiture is only available if the third party is in possession for the purpose of concealing or attempting to conceal or disguise their origin, ownership, destination, or location.

For legal persons, the sanction is up to "500 days of fine" and the possibility of suspension or dissolution. (*See* Penal Code §222 *bis*.) "Days of fine" is defined as the daily net income of the legal person. In addition, the court considers the degree of knowledge of management, the damage caused by the transaction, and the benefit obtained by the legal entity in fixing the appropriate sanction.

### **Books and Records Provisions**

Mexican law requires natural and legal persons to keep proper accounts, to accurately record transactions and inventory, and to maintain an adequate accounting system that best suits the conditions of business and enables the identification and tracking of each financial transaction. The penalties range from approximately \$150

to \$3,600 for most accounting offenses. (See Federal Fiscal Code §§28, 30; Fiscal Regulations §§26, 29, 30, 32, 32A.) Further, if the accounts are deliberately falsified, e.g., by keeping two sets of books, the penalty for natural persons includes three months to three years of imprisonment. For companies with listed securities the maximum fine is approximately \$450,000. (See Securities Market Law §26 *bis*.)

In addition, Mexico imposes auditing requirements on large or profitable companies. Under these audit rules, the auditors themselves are required to ensure that a company's books are accurate and are subject to a range of sanctions for noncompliance. (See Fiscal Code §§52, 91B, 96.)

### **Money Laundering**

Mexico's money laundering law applies to transactions involving the product of any illicit activity, and thus applies to the proceeds of bribery of a foreign official. (See Penal Code §400 *bis*.) However, under Mexican law, a money laundering prosecution may only be brought after there has been a conviction for the underlying offense.

### **Extradition/Mutual Legal Assistance**

Mexico can provide mutual legal assistance in both criminal and civil matters. In addition, Mexico will honor extradition requests. Although Mexico does not, except in exceptional circumstances, extradite its own nationals, it will commence its own prosecution in lieu of extradition.

### **Complicity, Attempt, Conspiracy**

Mexican law holds that accomplices are punishable as principals. (See Penal Code §13.) Accomplices include individuals who agree to or prepare the offense, who carry out the offense, individually, in a joint manner, or through a third party, who cause another to commit an offense or assist another in committing an offense, or who otherwise participate in the commission of an offense. In addition, Mexican law punishes attempt and conspiracy, which it defines as "part of a criminal organization or gang of three or more individuals [who] gather together with the purpose of committing a crime." (See Penal Code §§12(1), 64.)

## **Norway**

Norway signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on December 18, 1998. The amendments to the Penal Code were passed on October 27, 1998, and entered into force on January 1, 1999.

Norway has implemented the Convention by amending Section 128 of the Norwegian Penal Code to extend existing provisions of law regarding the bribery of domestic public officials to cover the bribery of foreign public officials and officials of public international organizations.

Sources for this analysis include the Penal Code, other Norwegian laws, and information provided by the U.S. embassy in Oslo.

There are concerns that under Norwegian law, the maximum penalty for bribery of a foreign public official is imprisonment for only one year, and that the relevant statute of limitations is only two years.

### **Basic Statement of the Offense**

Section 128 of the Penal Code provides:

Any person who by threats or by granting or promising a favor seeks to induce a public servant illegally to perform or omit to perform an official act, or who is accessory thereto, shall be liable to fines or imprisonment for a term not exceeding one year. The term public servant in the first paragraph also includes foreign public servants and servants of public international organizations.

Section 128 does not refer to intent. However, Section 40 of the Penal Code states that the provisions of the Penal Code apply only if a person acts intentionally. Section 128 also does not mention bribes paid through intermediaries, nor does it expressly address payments that are made to third parties for the benefit of a public official.

### **Jurisdictional Principles**

Norway exercises territorial jurisdiction over acts of bribery of foreign officials by any person so long as any part of the crime is committed in Norway. In addition to territorial jurisdiction, under Section 12.3(a) of the Penal Code, Norway applies nationality jurisdiction over crimes, including acts of bribery of foreign public officials, committed abroad by Norwegian nationals or persons domiciled in Norway.

Under Section 67 of the Penal Code, the statute of limitations for bribery of foreign officials is only two years. This is linked to the length of the maximum penalty. If Norway increases the maximum term of imprisonment, then the statute of limitations will automatically increase.

### **Coverage of Payor/Offerrer**

Section 128 specifically covers acts by "any person."

### **Coverage of Payee/Offeree**

Although Norway's law does not define "foreign public servant," we understand that Norway will inter-

pret this term in accordance with the requirements of the Convention.

### **Penalties**

Under Section 128, the penalty for natural persons for bribery of domestic or foreign public officials is a fine or imprisonment for a term not exceeding one year. It is not clear from the statute whether both a fine and imprisonment could be imposed. There is no stated limit on the amount of the fine.

Under Section 48(a) of the Penal Code, enterprises may be held criminally liable when “a penal provision is contravened by a person who has acted on behalf” of the enterprise. “Enterprise” is defined as “a company, society or other association, one-man enterprise, foundation, estate or public activity.” There is no stated limit to such fines; Section 48(b) lists factors that are to be considered in determining the size of the fine. Under Section 48(a), an enterprise may also “be deprived of the right to carry on business or may be prohibited from carrying it on in certain forms.”

Confiscation of both the bribe itself and the proceeds of bribery is authorized under Sections 34–37(d) of the Penal Code.

### **Books and Records Provisions**

Section 2.1 of the Norwegian Accounting Act requires that records be kept of all information that is “of importance for the size and composition of property, debts, income and expenditure.” Section 8.5 provides that violations of the Accounting Act are punishable by fines or imprisonment ranging from three months to six years.

Under Section 5.1 of the Auditing Act, auditors are required to ensure that accounts are correct, that the company manages its capital in a prudent fashion, and that there are satisfactory internal controls. Pursuant to Section 9.3, violators of the Auditing Act are subject to fines or imprisonment for up to one year.

### **Money Laundering**

Section 317 of the Penal Code makes it a crime to receive or obtain the proceeds of any criminal act under Norwegian law, as well as to aid and abet the securing of such proceeds for another person. As a result, bribery of domestic or foreign officials is a predicate offense for the purpose of application of money laundering legislation. Violations of Section 317 are punishable by fines or imprisonment for a term not exceeding three years. For “aggravated offenses,” the penalty is imprisonment for a term not to exceed six years.

### **Extradition/Mutual Legal Assistance**

Under the extradition treaty between the United States and Norway, bribery is an extraditable offense so long as it is punishable in both states by a penalty of deprivation of liberty for a period of more than one year. This dual criminality requirement is also found in Section 3.1 of the Extradition Act. As previously noted, currently Section 128 of the Penal Code provides that imprisonment shall not exceed one year. However, Section 3.2 of the Extradition Act provides that the “King-in-Council” may enter into extradition agreements covering criminal acts with penalties under Norwegian law of one year’s imprisonment or less. Section 2 of the Extradition Act prohibits the extradition of Norwegian nationals.

The United States and Norway do not have a mutual legal assistance treaty. Norway is a party to various European conventions relating to mutual legal assistance. It is our understanding that irrespective of other agreements, the OECD Convention provides a sufficient basis for Norway to provide mutual legal assistance to other parties to that Convention.

### **Complicity, Attempt, Conspiracy**

Section 128 of the Penal Code expressly applies to those who are accessories. Section 128 does not directly address attempt; rather the statute includes the phrase “seeks to induce.” The Penal Code contains no specific provisions on conspiracy.

## **The Slovak Republic**

The Slovak Republic signed the Convention on December 17, 1997, and deposited its instrument of ratification on September 24, 1999. The Slovak Republic partially implemented the Convention by amendments to its Criminal Code that entered into force on September 1, 1999. However, as noted below, there are significant gaps in the Slovak Republic’s legislation, which are expected to be filled by a complete revision of the Criminal Code that is currently under way.

The Slovak Republic’s current legislation raises several concerns. First and foremost, the Slovak Republic has not established any criminal or civil liability for corporations. Second, the Slovak Republic has retained the defense of “effective regret,” which, in the context of foreign corruption, creates a significant loophole.

### **Basic Statement of the Offense**

The basic statement of the offense of bribing foreign public officials is set forth in Section 161b(1) of the Slovak Criminal Code:

Whoever offers, promises or gives a bribe or other undue advantage, whether directly or through an intermediary, to a foreign public official in order that the official act or refrain from acting in relation to the performance of official duties with the intention to obtain or retain business or other improper advantage in the conduct of international business, shall be punished...

Section 161c provides similar coverage for bribery of members of foreign public assemblies, judges and officials of international courts, and representatives and employees of intergovernmental organizations of which the Slovak Republic is a member or whose jurisdiction it accepts.

Slovak law recognizes a defense of “effective regret,” which applies when the offender is solicited for a bribe by an official and immediately reports the crime to authorities. (*See* Cr. Code §163.) Although the purpose of this defense is to assist law enforcement in detecting and investigating domestic corruption by ensuring that corrupt officials are reported before they take any action in response to the bribe, this defense creates a potential loophole in cases of bribery of a foreign official where the Slovak Republic is not able to intervene immediately and prosecute the official before any benefit is conferred.

### **Jurisdictional Principles**

The Slovak Republic asserts both territorial and nationality jurisdiction over criminal offenses. Pursuant to Section 17 of the Criminal Code, Slovak law applies to offenses committed in whole or in part on Slovak territory as well as offenses committed abroad that were intended to have an effect within Slovak territory. Pursuant to Section 18 of the Criminal Code, Slovak law also applies to extraterritorial acts by Slovak nationals, as well as stateless persons and foreign nationals with permanent residency in the Slovak Republic. This nationality jurisdiction is qualified, however, by a requirement that the offense be punishable in the country in which the crime takes place. Finally, pursuant to Section 20 of the Criminal Code, the Slovak Republic will apply its law to the extraterritorial crimes of a non-national who is apprehended in the Slovak Republic but not extradited to the foreign state in which the crime took place, again subject to the condition of dual criminality.

### **Coverage of Payor/Offeror**

Slovak law imposes criminal liability only upon natural persons. Although there are some limited civil and administrative sanctions available, Slovak law does not pro-

vide for effective and dissuasive sanctions against legal persons for the offense of bribery of foreign public officials. We understand that the Slovak Republic intends to address this issue in its recodification of the Criminal Code.

### **Coverage of Payee/Offeree**

Section 89, paragraph 10 of the Criminal Code defines “foreign public official” as

any person holding a function in the legislative or judicial body or in the public administration of a foreign country [or] in an enterprise in which a foreign country exercises a decisive influence, or in an international organization established by states or other subjects of public international law.

In addition, Section 161c applies specifically to bribery of a

member of a foreign public assembly, foreign parliamentary assembly, or a judge or official of an international court whose jurisdiction is accepted by the Slovak Republic or to a representative or employee of an intergovernmental organization or body of which the Slovak Republic is a member or has a relationship following from a treaty, or to a person in a similar function.

### **Penalties**

The penalty for violation of the base offense under Sections 161b and 161c is punishment of up to two years and a monetary sanction. However, when the offender acts as part of an organized group or derives an “advantage of a large extent,” defined as 22 million Slovakia koruna (approximately \$47,600), the range of imprisonment is increased from one to five years. In addition, an offender may be fined up to SKK5 million (approximately \$117,000) and, pursuant to Sections 55 and 73 of the Criminal Code, any asset that was used to commit the crime or was obtained as a result of the crime may be forfeited from the offender or confiscated from third parties.

### **Books and Records Provisions**

Slovak law requires all companies, including state-owned enterprises, to maintain “accounts in a complete, open, and correct manner so that they fairly report all events that are subject to accounting.” (*See* Law on Accounting No. 563/1991 Coll, §7(1).) Companies that meet certain income requirements are required to have audited financial statements and to publish certain information concerning their financial statements (*id.* at §20.) Auditors are required to report evidence of money

laundering but not other crimes. (*See* Law No. 249/1994 Coll. to Prevent Laundering Proceeds of Most Serious Crimes.) Violations of the Accounting Law are punishable by fines of up to SKK1 million (approximately \$23,800). (*See* Law on Accounting, §37.) In addition, the use of false or distorted data in connection with the keeping of commercial records may also be punished under Section 125 of the Criminal Code, which carries with it sanctions that include bans on future business activities, forfeiture of property, and monetary sanctions and, if the offender violated a specific duty resulting from the law or his employment, imprisonment from one to five years.

### **Money Laundering**

Bribery of a foreign official is a predicate offense for the Slovak Republic's money laundering law, provided that the amount laundered exceeds SKK4 million (approximately \$9,500). (*See* Cr. Code §252.)

### **Extradition/Mutual Legal Assistance**

The Slovak Republic recognizes the offense of bribery of foreign officials as a basis for extradition, subject to the requirements of dual criminality and reciprocity. Although the Slovak Republic will not extradite its nationals, the Slovak Prosecutor General's Office will proceed against such nationals at the request of a foreign country's authorities. (*See* Cr. Code §21.)

The Slovak Republic can render mutual legal assistance under both treaty and nontreaty mechanisms, subject to a requirement of reciprocity. Dual criminality is not required, and bank secrecy is not a bar in either criminal or civil matters. (*See* Law on Banks No. 21/1992, §38.)

### **Complicity, Attempt, Conspiracy**

Slovak law treats accomplices as principals. (*See* Cr. Code §§9, 10.) A person is liable for the offense if he is involved in preparing, attempting, or committing the offense. A person may be deemed to have participated in the offense by inciting, aiding, abetting, or authorizing the commission of the offense. Slovak law also criminalizes attempt. (*See* Cr. Code §8(1).)

Slovak law provides for the separate prosecution of conspiracy only for offenses that fall within the statutory definition of a "very serious criminal offense," a definition that limits such offenses to offenses with a maximum penalty of eight years' imprisonment or more. (*See* Cr. Code §§7, 41(2), 62(1).) Accordingly, conspiracy to bribe foreign political officials is not covered by the Slovak conspiracy law.

## **Spain**

Spain signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on January 14, 2000. The Spanish implementing legislation, found in the Organic Act 3/2000 of January 11, entered into force on February 2, 2000. In order to implement the Convention, Spain added Article 445 *bis* (the basic statement of the offense of bribery of foreign public officials) to its Penal Code. Sources for this analysis include provisions from the Spanish Penal Code and information from the U.S. embassy in Madrid.

The Spanish legislation divides the offense of bribery of foreign public officials into several categories, making it difficult to determine the respective penalties, statute of limitations, etc., for each type of offense. We are concerned that the amended Spanish Penal Code does not provide criminal responsibility for legal persons, and the administrative and civil sanctions that it does provide may not be effective, proportionate, and dissuasive as required by the Convention. Finally, Spain did not add a separate definition of "foreign public official" to its Penal Code to implement the Convention. Therefore, it is our understanding that Spanish judges will have to read the existing definition for domestic officials in conjunction with the definition found in the Convention itself.

### **Basic Statement of the Offense**

Article 445 *bis* of the Spanish Penal Code provides: Whoever, through presents, gifts, offers or promises, bribes or attempts to bribe, directly or through intermediaries, authorities or public officials, whether foreign or from international organizations, in the exercise of their position for themselves or for a third party, or complies with their demands, so that they act or refrain from acting in relation to the performance of official duties, to obtain or retain a business or other improper advantage in the conduct of international business, will be punished pursuant to the penalties set forth in Article 423.

Article 445 *bis* covers the active bribery of foreign public officials or officials of international organizations, and criminalizes donations, presents, offers, or promises. It is our understanding that "to offer or promise" covers offering, promising, or giving.

### **Jurisdictional Principles**

Spain exercises both territorial and nationality jurisdiction. Under Article 23 of the Judiciary Organic



Act, Spanish courts may assert jurisdiction over any acts committed wholly or partly in Spanish territory, and on board Spanish ships or airplanes. Article 23.2 provides that Spain will also have jurisdiction over acts committed abroad by Spanish nationals or foreigners possessing Spanish nationality after committing the act, but only if

- The act (bribery) is punishable under the law of the place where it was committed.
- Either the aggrieved party or Attorney General's office has made a claim before the Spanish courts.
- The accused has not been absolved, pardoned, or punished abroad for the same act. (If he or she already has served part of the sentence, then the Spanish authorities will take this into consideration in deciding what the Spanish sentence should be.)

### **Coverage of Payor/Offeror**

As stated above, Article 445 *bis* applies to "whoever." The Spanish code covers actions by individuals, even though actions may be carried out by a body corporate. The Spanish legal system does not establish criminal liability for legal persons, although it does provide for some administrative and civil penalties.

### **Coverage of Payee/Offeree**

Article 445 *bis* covers bribes to authorities or public officials, whether foreign or from international organizations. There is no separate definition for foreign public officials under the Spanish Penal Code. Instead, Spanish courts will have to read Article 24 of the Spanish Penal Code, which defines public authorities and officers, in conjunction with the Convention's definition of foreign public official in Article 1.4a for a full understanding of the definition.

### **Penalties**

Article 445 *bis* provides that the penalties for bribery of a foreign public official will be those found under Spanish Penal Code Article 423. Article 423 refers to penalties for passive domestic bribery, found in Articles 419, 420, and 421 of the Spanish Penal Code. Article 419 provides for punishment by imprisonment from two to six years and a fine for as much as three times the amount of the bribe. Article 420 provides that for completed unjust acts that are not crimes, the penalty is imprisonment from one to four years; for attempt for such acts, the penalty is imprisonment from one to two years; and for both, a fine for as much as three times the value of the bribe. Article 421 provides that if a bribe is made so that an official would refrain from acting within the

scope of his or her duties, the penalty is a fine for as much as three times the value of the bribe.

The Spanish Code does not provide for criminal liability for legal persons. However, the manager of the legal person may be held liable for the acts of his or her employees pursuant to Article 31 of the Spanish Penal Code. Article 31 provides that

Whoever acts as a "de facto" or "de jure" manager of a legal person, or who acts on behalf of or as a legal or voluntary representative of another, will have to answer personally, even though he may not have the conditions, qualities or relations that the corresponding crime or misdemeanor requires to be the active subject of the same, if these circumstances exist in the entity or person on whose behalf or under whose representation he acts.

Article 20.a of the 13/1995 Act Concerning Contracts with the Public Administration, as amended by the 53/1999 act, provides that a legal person may be prohibited from Spanish government procurements for up to eight years where the legal person's representatives have been convicted of criminal offenses on its behalf.

Pursuant to certain articles under the Spanish Criminal Procedural Act, including Articles 13, 299, 334–338 and 589, Spanish judges may order the seizure of donations, presents or gifts, assets, instruments, and proceeds related to the offense of bribery of foreign public officials. Confiscation is available under Article 127 of the Spanish Penal Code, which provides:

Penalties imposed for a culpable crime or misdemeanor will bring with them the loss of the effects coming from it and the instruments used to commit it, as well as the profits coming from the crime whatever the transformations they may have suffered. These effects, instruments and profits will be seized, except when they belong to a bona fide third party, who is not responsible for the crime, and who has legally acquired them. Effects and instruments seized will be sold if their trade is legal, and their product will be used to cover the civil responsibilities of the sentenced person. If their trade is illegal, they will be dealt with according to the regulations and if no regulations apply, they will be destroyed.

Article 127 provides that confiscation may only be effected up to the amount needed to cover the offender's "civil responsibilities" such as damages and compensation, the cost of the legal proceedings, and the fine, as set forth in Article 125 and 126.

Pursuant to Spanish Penal Code Articles 131 and 33, the length of the statute of limitations depends on the severity of crime allegedly committed. Accordingly, the statute of limitations for bribery of foreign public officials subject to punishment under Article 419 is ten years, and the statute of limitations for bribery punishable under Article 420 is five years. Article 132 provides that the statute of limitations period begins on the date the offense was committed, or when the last act of a continuous series of offenses took place, or when the illegal activity ceased.

### **Books and Records Provisions**

Bookkeeping is regulated under the Spanish Commercial Code and several other related laws. Article 25.1 of the Spanish Commercial Code provides that “all entrepreneurs must keep orderly accounts suitable to the business conducted to provide for chronological monitoring of all the respective operations, and draw up balance sheets and inventories on a regular basis.” Article 1 defines an entrepreneur as an individual who owns a company or a corporate body. Article 25.2 provides that the entrepreneur or duly authorized person must maintain accounting books. Article 29.1 states that all accounting book entries must be in chronological order and clearly comprehensible. Article 30.1 requires that books and records be kept for six years. Financial statements, including balance and income sheets, must be submitted at year-end closing pursuant to Article 34.1. Article 34.2 provides that annual accounts must clearly and accurately disclose the company’s financial situation, assets, and liabilities. Accounting principles are also covered under the Royal Decree 1643/90, of December 20, which enacted the General Plan of Accounting. Auditing requirements are set forth *inter alia* in the Law on Accounts Auditing of June 13, 1988, and the Companies Act, adopted under Royal Legislative Decree 1564/1989, of December 22.

### **Money Laundering**

Article 301 of the Spanish Penal Code provides that whoever acquires, converts, or transmits goods, or carries out any other act to help someone else do so, including hiding the illicit origin of the goods, knowing that they originated from a serious crime, will be punished by imprisonment from six months to six years and a fine up to three times the value of the goods. A conviction for the underlying offense is not required. It is our understanding that bribery of foreign public officials will be considered a “serious crime” and therefore a predicate offense for money laundering legislation when punishable under Article 419 and 420 of the Spanish Penal Code. Article 301.4

provides that predicate offenses for Spanish money laundering legislation may occur in whole or in part abroad.

### **Extradition/Mutual Legal Assistance**

Spain generally does not require dual criminality and will provide mutual legal assistance in penal matters. Spain has entered into multilateral agreements on mutual legal assistance, such as the European Agreement on Legal Assistance of April 20, 1959. Spain is a party to multilateral treaties for mutual legal assistance in criminal matters with Germany, Belgium, Austria, Bulgaria, Denmark, France, Hungary, Iceland, Luxembourg, the Netherlands, Portugal, the Czech Republic, Sweden, Turkey, Finland, Greece, Ireland, Italy, Norway, Poland, the Slovak Republic, the United Kingdom, and Switzerland. Spain has entered into bilateral treaties for mutual legal assistance in criminal matters with Argentina, Canada, the United States, Australia, Mexico, and Chile.

Where dual criminality is required under one of the treaties, it will be deemed to exist if the offense upon which mutual legal assistance is based falls under the scope of the Convention. If no treaty applies, Spain will apply the principle of reciprocity. It already does this with Brazil, Japan, New Zealand, and Korea. Where no multilateral or bilateral treaty or the principle of reciprocity applies, we understand that Spain will consider the Convention a sufficient legal basis for mutual legal assistance. According to Article 8.1 of the Constitutional Act, when it is considered to be in the public interest to do so, Spain may not allow a request for legal assistance to be rejected by invoking bank secrecy.

Spain will also extradite persons for crimes committed under the Convention under its existing bilateral and multilateral extradition treaties. Spain has multilateral extradition treaties with Austria, Belgium, Bulgaria, the Czech Republic, Denmark, Finland, France, Germany, Greece, Hungary, Iceland, Ireland, Italy, Luxembourg, the Netherlands, Norway, Poland, Portugal, the Slovak Republic, Sweden, Switzerland, Turkey, and the United Kingdom. Spain has bilateral extradition treaties with Argentina, Australia, Brazil, Canada, Chile, Korea, Mexico, and the United States. It is our understanding that Spain will consider the Convention (in the absence of a bilateral or multilateral treaty) a legal basis for extradition. However, it appears that Spain will not extradite persons who bribed a foreign public official to refrain from doing an act which should have been done within his or her official capacity (as the penalty for such an offense is a fine only). Spain will extradite its own nationals for crimes pursuant to its multilateral and bilateral treaties, or in the absence thereof, using the Convention as a basis. Article 3.3 of the Passive

Extradition Act provides that where extradition is refused due to nationality, the charge will be reported to the Attorney General for appropriate legal action.

### **Complicity, Attempt, Conspiracy**

Article 27 of the Spanish Penal Code provides that principal offenders and accomplices are responsible for crimes and misdemeanors. Article 28 provides that principal offenders are those who carry out the offense, jointly or by using another as an instrument, including those who assist either directly or indirectly and those who cooperate by performing an act necessary for the perpetration of the crime. Article 29 defines accomplices as those not covered by Article 28 who cooperate in the execution of a crime through previous or simultaneous actions. Pursuant to Article 63 of the Spanish Penal Code, accomplices receive a lower penalty than the main perpetrator of the offense.

## **Sweden**

Sweden signed the Convention on December 17, 1997, and deposited its instrument of ratification with the OECD on June 8, 1999. Implementing legislation amending the Penal Code was enacted on March 25, 1999, and entered into force on July 1, 1999. The following analysis is based on those amendments, related Swedish laws, and reporting from the U.S. embassy in Stockholm.

The maximum sentence for bribery of a foreign public official is imprisonment for only two years, raising questions about whether the penalties are sufficiently “effective, proportionate and dissuasive.”

### **Basic Statement of the Offense**

Under Chapter 17, Section 7 of the Penal Code, it is unlawful to give, promise, or offer a bribe or other improper reward, whether for one’s self or any other person, to, *inter alia*, a minister of a foreign state, a member of a foreign legislative assembly, a person exercising public authority in a foreign state, or a member of the European Commission, the European Parliament, or the European Court of Auditors, or judges of the European Court of Justice for the exercise of official duties. This provision does not expressly address bribes offered or made through intermediaries. The law is not limited to bribes given in order to obtain or retain business or other improper advantage in the conduct of international business.

### **Jurisdictional Principles**

Chapter 2, Section 1 of the Penal Code establishes jurisdiction over crimes committed in Swedish territory. Chapter 2, Section 2 provides that “a crime is

deemed to have been committed where the criminal act was perpetrated and also where the crime was completed or, in the case of an attempt, where the intended crime would have been completed.” Where a crime is committed in Sweden by an alien on a foreign vessel or aircraft against “another alien or foreign interest,” under Chapter 2, Section 5 authorization from the Swedish Government is required to initiate a prosecution. Under Chapter 2, Section 2, jurisdiction may be established over Swedish nationals and foreign nationals domiciled in Sweden for crimes committed outside Sweden (1) if the act is criminal under the law of the place where it was committed, or (2) if the act was committed outside the territory of any state, the punishment involves deprivation of liberty. Prosecution of offenses committed outside Sweden generally requires authorization from the Swedish Government.

Under Chapter 35, Section 1 of the Penal Code, the statute of limitations is five years for crimes punishable by a maximum term of imprisonment of two years.

### **Coverage of Offeror/Payor**

Chapter 17, Section 7 of the Penal Code refers to acts by “a person.” Under Swedish law, legal persons are not subject to criminal liability per se. However, under Chapter 36, Section 7 of the Penal Code, entrepreneurs are subject under certain circumstances to “quasi-criminal” corporate fines for crimes committed in the exercise of business activities. (“Entrepreneur” is defined in the Part III of the Commentary to the Penal Code as “any natural or legal person that professionally runs a business of an economic nature.”)

### **Coverage of Payee/Offeree**

Chapter 17, Section 7 covers bribes offered or paid to a minister of a foreign state, a foreign legislator, or a member of a foreign directorate, administration, board, committee or other such agency belonging to the state or to a municipality, county council, association of local authorities, parish, religious society, or social insurance office. Also covered are members of the European Union Commission, the European Parliament, and the European Court of Auditors, as well as judges of the European Court of Justice. The statute applies in addition to those who otherwise exercise public authority in a foreign state.

Under Chapter 17, Section 17, cases of bribery involving certain payees/offerees can be prosecuted only if the offense is reported for prosecution by the employer or principal of the payee/offeree or if prosecution is called for in the public interest. This category apparently includes bribes of foreign public officials other than min-

isters of foreign states, members of foreign legislatures, and officials of certain EU institutions.

### **Penalties**

Chapter 17, Section 7 provides that bribery of foreign (or domestic) public officials is punishable by a fine or imprisonment for a maximum of two years. (The maximum sentence in Sweden for the most severe crimes is imprisonment for ten years.) Guidelines for determining the appropriate penalty, including aggravating and mitigating circumstances, are listed in Chapter 29 of the Penal Code. Fines, which are assessed in accordance with Chapter 25 of the Penal Code, generally range from 900 to 150,000 Swedish crowns (approximately \$100–\$16,500).

Under Chapter 36, Section 8, corporate fines for “entrepreneurs” may range from 10,000 to 3 million Swedish crowns (approximately \$1,100–\$330,000). Chapter 36, Section 9 provides that in determining the amount of the fine, “special consideration shall be given to the nature and extent of the crime and to its relation to the business activity.” Chapter 36, Section 10 sets forth certain circumstances requiring the mitigation or nonimposition of corporate fines.

Chapter 36, Section 1 of the Penal Code authorizes the forfeiture of the “proceeds of crime” unless forfeiture would be “manifestly unreasonable.” Under Chapter 36, Section 4, the value of “financial advantages” derived “as a result of a crime committed in the course of business” may be forfeited, unless such forfeiture would be “unreasonable.”

### **Books and Records Provisions**

Accounting obligations are set forth in the Bookkeeper Act, which applies generally to persons carrying out business activities. The Companies Act requires that companies have audits performed by independent auditors, and contains rules on reporting irregularities that are discovered during audits. For private partnerships and individuals, audits are required under the Accounting Act. Chapter 11, Section 5 of the Penal Code provides that bookkeeping offenses carry penalties of up to two years imprisonment, with a possible increase up to four years in “gross” cases.

### **Money Laundering**

Money laundering is a crime under Chapter 9, Section 6a of the Penal Code. All crimes by which an individual has enriched himself, or involving a criminal acquisition, are predicate offenses for purposes of this statute.

### **Extradition/Mutual Legal Assistance**

Extradition between the United States and Sweden is governed by a 1961 bilateral treaty (entered into force in 1963), supplemented by a convention that entered into force in 1984. Under the treaty as amended, offenses are extraditable if they are punishable by deprivation of liberty for a period of at least two years under the laws of both parties. Sweden is a party to the European Convention on Extradition and has bilateral extradition treaties with a number of countries. Pursuant to the Act on Extradition of Offenders, Sweden may extradite in the absence of an extradition agreement. Section 4 of that Act authorizes extradition for offenses punishable in Sweden by imprisonment for more than one year. Under Section 2, extradition of Swedish nationals is prohibited except with respect to requests from other Nordic countries.

Legal assistance to foreign states may be provided under the Act with Certain Provisions Concerning International Mutual Assistance in the Field of Criminal Cases, the Act on the Use of Coercive Measures at the Request of a Foreign State, and the Act on Taking Evidence for a Foreign Court. Dual criminality is generally required. A mutual legal assistance agreement with the foreign state is not necessary. The United States and Sweden do not have a mutual legal assistance treaty.

### **Complicity, Attempt, Conspiracy**

Chapter 23, Section 4 of the Penal Code establishes liability for those who further a criminal act by “advice or deed” or who induce another to commit the act. Under Swedish law, attempt per se is not a punishable offense with respect to bribery, although the offense of bribery includes the act of offering a bribe. Likewise, conspiracy is not a punishable offense with respect to bribery.

### **Switzerland**

Switzerland signed the Convention on December 17, 1997. The Swiss Parliament adopted a law ratifying and implementing the Convention on December 22, 1999. Because of a mandatory three-month period (allowing for a possible referendum) which began on January 11, 2000 (the date that the legislation was published in the *Official Gazette*), the law did not enter into force until May 1, 2000. Switzerland deposited its instrument of ratification with the OECD on May 31, 2000. This analysis is based on the relevant Swiss Penal Code provisions and information from the U.S. Embassy in Bern.

Concerns with the Swiss implementing legislation include a lack of legal responsibility for legal persons

and no monetary fines for natural persons. However, it is our understanding that a new provision on the responsibility of legal persons has been introduced within the framework of ongoing revisions of the general provisions of the Penal Code.

### **Basic Statement of the Offense**

The basic statement of the offense of bribery of a foreign public official is contained in Title 19, Article 322 *septies* of the Swiss Penal Code (PC), which provides that

Anyone who offers, promises, or grants an undue advantage to a person acting for a foreign state or an international organization, as a member of a judicial or other authority, a civil servant, expert, translator, or interpreter employed by an authority, or an arbitrator or military person, for that person or for another, for him to act or not to act in his official capacity, contrary to his duties, or using his discretionary powers, will be punished by five years of imprisonment...

### **Jurisdictional Principles**

Article 3, line 1 of the PC provides that it is applicable to anyone who commits a crime or offense in Switzerland. It is our understanding that bribery of a foreign public official which occurs in whole or in part in Switzerland will fall within Swiss jurisdiction. Switzerland exercises jurisdiction over extraterritorial offenses committed by Swiss nationals in limited circumstances. Under Article 6 of the PC,

Swiss criminal law may apply to a Swiss person who commits a crime or offense overseas that would be extraditable under Swiss law, if the act is also a crime in the foreign state where committed, and if the actor resides in Switzerland or is extradited to the Confederation because of his infraction. The foreign law will be applicable if it is more favorable to the guilty party.

Although non-Swiss persons within Swiss territory currently cannot be prosecuted, it is our understanding that within the framework of ongoing revisions to the general parts of the PC, the application of Swiss law will be enlarged to cover acts by such persons.

### **Coverage of Payor/Offendor**

The Swiss law currently covers natural persons. A new provision on the responsibility of legal persons has been introduced within the framework of ongoing revisions of the general provisions of the Penal Code.

### **Coverage of Payee/Offeree**

It is our understanding that Article 322 *septies* covers all foreign public officials as defined under the Convention, as it includes “persons acting for a foreign state or an international organization or as a member of a judicial or other authority.” We understand that all levels of government, including those at the local and state levels, are also covered. Members of the judiciary are specifically mentioned, as are civil servants, arbitrators, translators, and interpreters. It is also our understanding that by its terms article 322 *septies* includes any person exercising a public function.

### **Penalties**

The new Swiss legislation provides for a maximum prison term of five years for natural persons, which is the same penalty for bribery of domestic officials. There is no minimum sentence. Article 63 of the PC provides that “the court shall determine the sentence based upon the behavior of the offender in committing the offense, taking into account his motives, prior history and personal situation.” There are no fines under Swiss law for bribery offenses committed by natural persons. In addition to imprisonment, Swiss law also provides for other sanctions such as: disqualification from holding a public office under Article 51 PC; disqualification from employment under Article 54 PC; deportation of foreigners under Article 55 PC; and publication of the judgment under Article 61 PC.

Although currently legal entities cannot be punished under Swiss jurisprudence, an agent of the legal person can apparently be held criminally liable. Swiss law also provides for civil and administrative sanctions which may be indirectly imposed on Swiss companies as third parties to an offense.

Article 59 of the Penal Code provides that a judge may confiscate assets or their monetary equivalent resulting from an offense or which would have served as payment to an individual for committing a crime. Confiscation from legal entities is currently only possible when they are considered as third parties to, and not the authors of, the offense. However, it is our understanding that once the new law concerning legal responsibility for legal persons is enacted, companies will also be subject to direct confiscation under Article 59. Seizure is also provided for in the civil codes and in the laws of the cantons.

Article 70 of the Penal Code provides that the statute of limitations for a criminal act is ten years for violations punishable by imprisonment of more than three years, which is the case for bribery of a foreign public

official. According to Article 71, the statute of limitations will run from the day when the accused committed the act; or, if the actions were done in several stages, then from the day of the last of the acts; or, if the actions lasted over a longer period, then from the last day of their completion. Article 72 provides that the statute of limitations will not run during an ongoing investigation or following a judicial decision concerning the accused. In the case of bribery of a foreign public official, the clock may be stopped for a maximum of fifteen years.

### **Books and Records Provisions**

The Swiss Debtors Code (“Obligations”) contains the Swiss provisions on books and records. Any company that must register its trade name with the commercial register is required to maintain its books and records in accordance with Swiss accounting rules. It is our understanding that Article 957 of the Swiss Debtors Code generally covers the acts prohibited by Article 8 of the Convention.

### **Money Laundering**

Article 305 *bis* of the Penal Code on money laundering provides that anyone who commits acts that may prevent the identification of the origin, discovery, or confiscation of sums which the person knows or should have known resulted from a crime, will be punished by imprisonment or a fine. Just as with bribery of domestic officials, bribery of foreign public officials will be a predicate offense for the application of Swiss money laundering legislation. Under line three of article 305 *bis* of the PC, the money launderer is punishable when the predicate offense was committed outside of Switzerland and is also punishable in the state where it was committed.

### **Extradition/Mutual Legal Assistance**

Article 35 of the Federal Law on International Mutual Legal Assistance in Criminal Matters (EIMP) provides that extradition may be granted if: (1) the act is punishable under both Swiss law and the requesting country by imprisonment of a maximum of at least a year or a more severe penalty, and (2) Switzerland does not have jurisdiction.

Swiss law on mutual legal assistance is provided for in the EIMP. Mutual legal assistance in foreign criminal proceedings is provided for in Part III of the EIMP. More specifically, discovery of procedural or official Swiss documents is governed by Article 63 of the EIMP. In order to obtain mutual legal assistance which entails coercion under Article 63, Article 64 provides that the re-

questing country must show that the elements of the crime are also punishable under Swiss law. Articles 85–93 of the EIMP contain provisions on the delegation of criminal prosecutions, and Articles 94–108 of the EIMP contain provisions on the delegation of enforcement of criminal judgments. Dual criminality must exist for there to be mutual legal assistance. This requirement will be satisfied with the entry into force of Article 322 *septies* for bribery of foreign public officials. Switzerland ratified the European Convention on Mutual Legal Assistance on April 20, 1959.

It is our understanding that although Article 47 of the Federal law on banking and accounts protects bank secrecy, such protection is not absolute. Under Federal and cantonal law, banks and their agents and employees must testify and supply certain information to the authorities where the law provides that they have a duty to do so, particularly in criminal proceedings.

### **Complicity, Attempt, Conspiracy**

Complicity is covered in Articles 24 and 25 of the Penal Code. Article 24 defines an “instigator” as a person who intentionally persuades another to commit a crime. That person is punished as the “main author” of the crime if it is carried out. An “accomplice” is defined as someone who intentionally lends his assistance in furtherance of a crime. Article 25 provides that courts may penalize the accomplice to a lesser extent than the “main author,” depending on the facts of the case. Although authorization is not specifically covered under Swiss law, it may fall within the articles on complicity. Attempt for bribery of a foreign public official is covered under Swiss Penal Code Articles 21 and 23. Conspiracy does not exist under Swiss law, although Swiss Penal Code article 260 *ter* criminalizes participation in or support of a criminal organization.

## **United Kingdom**

The United Kingdom signed the Convention on December 17, 1997. Parliament approved ratification on November 25, 1998, and the U.K. deposited its instrument of ratification with the OECD on December 14, 1998. The U.K. is considering a new corruption statute. The U.S. embassy reports that the U.K. was scheduled to publish a “consultation paper” in May 2000, which would be followed by a short (approximately ninety-day) public comment period. The full bill may be introduced to Parliament in the fall of 2000.

We based our analysis on the texts of relevant U.K. laws, a March 1998 report of the U.K. Law Commission

that considered how the U.K. would meet the requirements of the Convention, information obtained from nongovernmental organizations, and reporting from the U.S. embassy in London.

Our main concern with the existing legislation on which the U.K. is basing implementation of the Convention is that it is unclear whether it applies to the bribery of foreign public officials. Under U.K. law, bribery of public officials is primarily covered under the common law and under three statutes: the Public Bodies Corrupt Practices Act 1889, the Prevention of Corruption Act 1906, and the Prevention of Corruption Act 1916, referred to collectively as the Prevention of Corruption Acts. Although these statutes address the bribery of domestic public officials, they do not specifically address the bribery of foreign public officials, and we are unaware of any specific cases that interpret the law as applying to foreign public officials. Another concern we have is that although the U.K. has the constitutional authority to assert nationality jurisdiction, it has thus far declined to consider doing so with respect to offenses covered by the Convention.

### **Basic Statement of the Offense**

The U.K. is basing its implementation of the Convention upon the Prevention of Corruption Acts and the common law. Specifically, the U.K. considers that its laws comply with Article 1 of the Convention under the 1906 act, as amended by the 1916 act. Section 1(1) of the 1906 act states that

If any person corruptly gives or agrees to give or offers any gift or consideration to any agent as an inducement or reward for doing or forbearing to do, or for having after the passing of this Act done or forborne to do, any act in relation to his principal's affairs or business, or for showing or forbearing to show favour or disfavour to any person in relation to his principal's affairs or business ... he shall be guilty of a misdemeanor.

Generally, the 1906 act criminalizes bribes corruptly offered or given by any person to an agent to induce him or her to act or not to act in relation to his or her principal's affairs or business. "Agent" is defined under the Prevention of Corruption Acts as any person employed by or acting for another, a person serving under the Crown, or any local or public authority. It is our understanding that this definition covers domestic public officials, but it is unclear whether foreign public officials are covered.

### **Jurisdictional Principles**

With very few exceptions, the U.K. exercises only territorial jurisdiction. It is our understanding that if

any part of the offense, either the offer or acceptance or agreement to accept, takes place within the territory of the U.K. jurisdiction, it can be prosecuted in the U.K. The Criminal Justice Act of 1998 on Terrorism and Conspiracy provides that any conspiracy in the U.K. to commit crimes abroad is a criminal offense. The U.S. embassy reports that the antiterrorism legislation would apply to a conspiracy in the U.K. to bribe a foreign public official. The U.K. does not exercise nationality jurisdiction over bribery offenses, although it does exercise nationality jurisdiction over other offenses such as murder, high treason against the crown, and piracy.

### **Coverage of Payor/Offerrer**

The Prevention of Corruption Acts and the common law concern bribery by "any person" without distinction as to nationality. The 1906 act, which covers bribes by "any person," does not define "person." Schedule 1 of the Interpretation Act of 1978 states that "person" includes a body or person corporate or unincorporate. The U.K. legal system provides criminal liability for legal persons. Companies can be held criminally responsible, and fined, for the acts of those who control the company, including representatives of the company.

### **Coverage of Payee/Offeree**

It is our understanding that under the U.K.'s Prevention of Corruption Acts, a public official is identified based upon his or her position as an officer, member, or servant of a "public body." The 1916 act extended the definition of "public body" to include "local and public authorities of all descriptions." As stated above, the 1906 act uses agency law to criminalize bribes that would encourage an agent in the public or private sector to contravene the principal/agent relationship. Section 1(2) of the 1906 act defines "agent" as "any person employed by or acting for another" and Section 1(3) further provides that "a person serving under the Crown or under any corporation or any borough, county or district council, or any board of guardians, is an agent." The 1916 act provides that a person serving under a "public body" (i.e., under any local or public authority) is an agent within the meaning of the 1906 act. Nothing in either the Prevention of Corruption Acts or the common law indicates with certainty whether the U.K. law applies to foreign public officials. Furthermore, it is our understanding that the 1906 act does not cover members of Parliament or the Judiciary when they are acting in their official capacity.

## **Penalties**

The penalty for corruption in a magistrate's court is a maximum of six months imprisonment and/or a fine of £5,000 (approximately \$7,500). For convictions in crown courts, the penalty is a maximum of seven years imprisonment and/or an unlimited fine. There are no express provisions on corporate criminal liability, but we understand that companies can be fined for breaches of the criminal law. There is no statute of limitations under U.K. laws for prosecution of bribery cases. U.K. courts may order confiscation of the bribe and the bribe proceeds under the Criminal Justice Act of 1988, as amended by the Proceeds of Crime Act of 1995. Following a conviction, Section 43 of the Powers of Criminal Courts Act of 1973 allows a court to order forfeiture from the offender of lawfully seized property used to commit or facilitate the offense. It is our understanding that under Section 4 of the Criminal Justice (International Cooperation) Act of 1990, the U.K. Secretary of State may decide whether to grant a request for receiving assistance in obtaining evidence, such as bank records, inside the U.K.

## **Books and Records Provisions**

The Companies Act of 1985, Sections 221, 222, and 722 prohibit generally the establishment of off-the-books accounts, the making of off-the-books or inadequately identified transactions, the recording of nonexistent expenditures, the entry of liabilities with incorrect identification of their object, and the use of false documents. These provisions govern private and public limited companies, companies limited by guarantee, and unlimited companies. Section 223 provides that failure to comply with Sections 221 and 222 is an offense unless the company officer can show that he acted honestly and the default was excusable under the circumstances. On summary conviction, the penalty for an offense under Section 223 is a maximum term of six months and/or a fine of £5,000 (approximately \$8,000), on conviction by indictment, the penalty is imprisonment for a maximum term of two years and/or an unlimited fine. For violation of Section 722, the penalty is an unlimited fine, and if the violation persists, a daily fine. Section 17 of the Theft Act of 1968 also contains an offense for false or fraudulent accounting, the penalty for which is imprisonment for a maximum of two years. The Companies Act of 1985 also provides that certain companies must have an external audit.

## **Money Laundering**

It is our understanding that since offering and accepting bribes are indictable offenses, they automatically fall within the purview of the Criminal Justice Act of

1988, as amended by the Criminal Justice Act of 1993, which sets forth the U.K. money laundering legislation, both as to the bribe and the bribe proceeds.

## **Extradition/Mutual Legal Assistance**

The U.K. has extradition agreements with all of the OECD member countries except Japan and Korea. The U.K. is also a party to the Council of Europe Convention on Extradition of 1957. In the absence of an extradition agreement, the U.K. considers extradition requests on an ad hoc basis under Section 15 of the Extradition Act of 1989. If, under the law of the country requesting extradition, the offense is punishable with a prison term of twelve months or more, extradition may be available. U.K. nationals may be extradited.

Under Part I of the Criminal Justice Act of 1990 (International Cooperation), the U.K. can provide mutual legal assistance in criminal matters to other countries without treaties or agreements. It is our understanding that the U.K. will provide assistance to foreign authorities to facilitate any criminal investigation or proceeding in the requesting country, and that there is no threshold penalty level for the provision of mutual legal assistance. We further understand that dual criminality is not required for mutual legal assistance other than in general cases of search and seizure.

## **Complicity, Attempt, Conspiracy**

Complicity, aiding and abetting, incitement, and authorization are addressed in an 1861 act entitled "Aiders and Abettors," which provides that

Whosoever shall aid, abet, counsel, or procure the commission of [any indictable offense], whether the same be [an offense] at common law or by virtue of any Act passed or to be passed, shall be liable to be tried, indicted, and punished as a principal offender.

The Criminal Attempts Act of 1981, Section 1, provides that a person is guilty of an attempt when he or she "does an act which is more than merely preparatory to the commission of the offense." Under U.K. law, conspiracy to commit a crime is also a crime, and subject to the same penalties as the primary offense. The Criminal Law Act of 1977, as amended by the Criminal Justice (Terrorism and Conspiracy) Act of 1988, defines conspiracy as "an agreement that a course of conduct shall be pursued which will necessarily amount to or involve the commission of any offense or offenses by one or more of the parties to the agreement if the agreement is carried out in accordance with their intentions."